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In The
Supreme Court of the United States

DELROY C. SCHEELER, individually and on behalf of Craig A. Scheeler, and RHONDA L. SCHEELER, individually and as Trustee on behalf of Craig A. Scheeler,

Petitioners,

vs.

CITY OF ST. CLOUD, MINNESOTA, COUNTY OF STEARNS, MINNESOTA, DENNIS O'KEEFE, individually and in his former official capacity as Chief of Police for the City of St. Cloud, Minnesota, LARRY MEYER, individually, and in his former official capacity as Mayor of the City of St. Cloud, Minnesota, DR. DAVID FREDRICKSON, individually and in his official capacity as Medical Examiner for the County of Stearns, Minnesota, LEE MAYAVSKI, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota and a Deputy Medical Examiner for the County of Stearns, Minnesota, DAVID JOHNSON, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota, GARY LEININGER, individually and in his official capacity as a Police Officer/Evidence Technician for the City of St. Cloud, Minnesota, DAVID LABEAUX, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Delroy Scheeler and Rhonda Scheeler, Plaintiffs, (hereinafter "Scheelers") introduced evidence of a formal written policy of Stearns County, that when implemented, caused constitutional harm to Scheelers' Right of Access to the Courts. Scheelers also introduced credible evidence that the County of Stearns and the City of St. Cloud ratified and condoned the actions and inactions of their officers which caused Scheelers' Right of Access to Court to be rendered meaningless.

I. Whether implementation of the official policy of a municipal defendant that results in constitutional injury to a party satisfies the requirements for municipal liability as set forth in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) and *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 485 U.S. 112, 99 L. Ed. 2d 107 (1988)?

Scheelers presented to the Court a report from the State of Minnesota, Office of Crime Victim's Ombudsman, which found to be true all allegations made by Scheelers when the Ombudsman concluded that the St. Cloud Police failed to investigate, failed to preserve evidence, and failed to follow their training and departmental policies in the Scheeler case.

QUESTIONS PRESENTED FOR REVIEW – Continued

II. Whether plaintiffs in a 42 U.S.C. §1983 Right to Access Courts Claim were held to a higher standard of deliberate indifference than required by *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) when plaintiffs, in opposition to a motion for summary judgment, introduced evidence proving the state actors had both time to deliberate and objective knowledge of a serious risk of injury to plaintiffs and the lower court ruled that time to deliberate and objective knowledge of a serious risk of injury, as a matter of law, will not support a finding of deliberate indifference in a 42 U.S.C. §1983 claim?

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JURISDICTION

The Memorandum decision of the Eighth Circuit Court of Appeals affirming the judgment of the District Court was filed on March 31, 2005. A timely hearing for rehearing en banc was denied by Order filed May 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section,

any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Minnesota Statute §390.31 Subdivision 1.

It is declared to be in the public interest for medical doctors to conduct the medical investigations deemed necessary.

Minnesota Statute §390.33 Subdivision 1.

A county board shall appoint as permanent county medical examiner a doctor of medicine or osteopathy licensed to practice pursuant to chapter 147, or similar laws in any other state. A county medical examiner shall perform the duties imposed upon medical examiners by sections §390.31 to §390.35 and serve at the pleasure of the county board.

STATEMENT OF THE CASE

On March 24, 1997, Craig A. Scheeler died of a gunshot wound from a .357 Taurus handgun. The bullet entered his right temple and exited his left temple. Two witnesses were present at the scene when St. Cloud Police, Stearns County Deputy Medical Examiner and Paramedics arrived at the scene. The two witnesses told police that Craig Scheeler had shot himself. Craig Scheeler was taken to the hospital where he died one hour later. Having only the two witnesses' statements as evidence that Craig Scheeler had shot himself, the St. Cloud Police and Stearns County Medical Examiner's Office officially closed

the case, with no further investigation. No autopsy was performed, which caused critical evidence of the body to be destroyed. No gunshot residue or blood spatter tests were ever done. The scene was never secured, or considered to be a possible homicide scene, which again caused critical evidence to be destroyed. Delroy Scheeler and Rhonda Scheeler, father and mother of Craig A. Scheeler, sued the County of Stearns, the City of St. Cloud, and the individual officers under 42 U.S.C. §1983 for rendering their right to access the courts meaningless by failing to investigate, and failing to preserve known and available evidence of the scene and of the body.

The District Court granted summary judgment to the County of Stearns and the City of St. Cloud by concluding that defendants were not "persons" under 42 U.S.C. §1983 (App. 47). The District Court did not address or acknowledge Scheelers' *Monell* claim of liability due to an official policy. Scheelers appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals agreed with Scheelers that the County of Stearns and the City of St. Cloud were "persons" under 42 U.S.C. §1983 (App. 10), but dismissed Scheelers' claim nonetheless by concluding that Scheelers had not shown a "lack of training, or a custom or practice." (App. 11). The Eighth Circuit Court of Appeals did not address or acknowledge Scheelers' official written policy claim against the County of Stearns, or the official ratified policy claim against the City of St. Cloud. The Eighth Circuit panel offered no reason for their silence on Scheelers' *Monell* claim.

Scheelers presented evidence to the District Court and the Eighth Circuit Court of Appeals proving the County of Stearns has an official written policy that allows deputy medical examiners to conduct post-mortem body exams,

medical investigations and determine cause and manner of death in all deaths in Stearns County, contrary to the mandate in Minnesota Statutes, which requires a medical doctor to fulfill these duties.

Official written policy of Stearns County

> "In 1993, the Medical Examiner System replaced the County Coroner in Stearns County. The Detective/Deputy Medical Examiner assumes the responsibility for the investigation of all unattended deaths which occur in Stearns County. A determination is made as to the manner and cause of all reportable deaths. This determination is achieved through a variety of post-mortem examinations conducted by or at the direction of the Detective/Deputy Examiner."

Evidence was presented to the courts (Trial testimony of Officer/Deputy Medical Examiner Lee Mayavski) that established Stearns County Deputy Examiner Mayavski, is not a medical doctor as required by Minnesota Statute:

Minnesota Statutes §390.31 and §390.33 state the following:

§390.31 Subdivision 1. It is declared to be in the public interest for medical doctors to conduct the medical investigations deemed necessary.

§390.33 Subdivision 1. A county board shall appoint as permanent county medical examiner a doctor of medicine or osteopathy licensed to practice pursuant to chapter 147, or similar laws in any other state. A county medical examiner shall perform the duties imposed upon medical examiners by sections 390.31 to 390.35 and serve at the pleasure of the county board.

Stearns County's written policy was carried out precisely as it is written. Officer Lee Mayavski, doubles as a St. Cloud Police Officer/Stearns County Deputy Medical Examiner, testified that he has no medical training and was the only person from Stearns County Medical Examiner's Office to examine Craig A. Scheelers' body. Lee Mayavski determined that Scheeler had shot himself, and without preserving any evidence of the body, or getting any further opinion, allowed all body evidence to be destroyed by releasing the body for burial preparations. Dr. Fredrickson, chief medical examiner for Stearns County, had no investigative involvement with the Scheeler case, never viewed Craig Scheelers' body or any other evidence. He relied solely on a phone conversation with Deputy Lee Mayavski and signed the death certificate accordingly. (Affidavit of Ron Walsh) Deputy Lee Mayavski then officially closed the case one week after Craig Scheeler died.

Scheelers presented to the court evidence that following this policy of handling deaths in Stearns County directly caused the destruction of evidence that caused Scheelers' wrongful death lawsuit against the two witnesses to fail. This evidence, among others, is noted in the Mayavski reports and newspaper article written by St. Cloud Police Chief O'Keefe. Evidence noted by the police is high velocity blood spatter on the palm of Craig A. Scheelers' right hand. Close up photographs taken by police technician show this spatter. All experts, including Defendants' blood spatter experts Tom Bevel and Ramsey County Medical Examiner, Dr. McGee agreed and testified under oath that what is seen in the photographs in consistent with high velocity blood spatter. They also agreed and testified that if this be true, Craig Scheeler was not

holding the gun at the time of discharge. To Scheelers' detriment, however, they testified that they could not confirm one way or the other, since all they had was a photograph, and one cannot test a photograph to say what it is. The defense used this weakness against Scheelers in court.

Scheelers presented to the court evidence that Chief O'Keefe, as policy maker for the City of St. Cloud, publicly ratified and condoned the actions of his officers in the St. Cloud Times Newspaper. The City of St. Cloud and the County of Stearns have ratified and condoned their officer actions by claiming their investigation to be diligent and thoughtful.

Scheelers presented to the District Court and the Eighth Circuit Court of Appeals, a report by the State of Minnesota, Office of Crime Victims Ombudsman (App. 50), who did an independent investigation of the St. Cloud Police Department concerning the Scheeler case. The State of Minnesota found that officers, supervisors, and investigators made hasty determinations (App. 58), quickly surrendered the scene (App. 65), and failed to investigate any further (App. 54). They determined that officers did not follow their training or policies (App. 56), failed to preserve the scene or body (App. 57), and did not ever investigate the death as a potential homicide (App. 54). If the court views the evidence in the light most favorable to Scheelers, the court must accept as true the State of Minnesota, Office of Crime Victims Ombudsman Report and all of their findings. If these allegations are taken as true, then the conduct ratified and condoned by Chief O'Keefe and the City of St. Cloud and all defendants would be; failure to investigate, failure to preserve evidence, failure to follow training, failure to follow policies, quickly

surrendering the scene and jumping to a conclusion. This ratification represents official policy.

Scheelers did not argue the *Monell* official policy issues to the Eighth Circuit Court of Appeals, since the District court did not make any ruling on these issues. The only issue concerning the municipalities that the District Court ruled on was that Municipalities are not "persons" under 42 U.S.C. §1983 (App. 47). Scheelers did however point out to the Eighth Circuit Court of Appeals that their full argument about Municipal Policy was in the document "Objection to Dismissal" and attached a copy of it in their appendix. This document clearly refers to a written policy statement by Stearns County and a ratified policy statement by the City of St. Cloud. It also refers to the blood spatter evidence on the right palm of Craig Scheeler acknowledged in police reports and Chief O'Keefe's newspaper article, but never preserved, as resulting in damage to Scheelers, among others, as referenced above.

The District Court also granted summary judgment to the individual officers (App. 40), holding Scheelers to a standard of intentional conduct (App. 39). The Eighth Circuit Court of Appeals agreed with Scheelers that the correct standard should be that of deliberate indifference (App. 9), but dismissed the case stating that the officers conducted a "thorough investigation" and "preserved most of the evidence" and therefore could not have been deliberately indifferent to Scheelers' rights (App. 9).

The State of Minnesota Office of Crime Victims Ombudsman report, referred to above, completely refutes this characterization.

Scheelers petitioned the Eighth Circuit Court of Appeals to hear these issues en banc, but this petition was denied by Order dated May 10, 2005 (App. 49).

REASONS FOR GRANTING WRIT OF CERTIORARI

I. Introduction.

Petitioners submit the following in support of their petition for a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals affirming the United States District Court for the District of Minnesota, granting respondent's Motion for Summary Judgment.

In granting Summary Judgment, the Eighth Circuit Court of Appeals departed from the accepted standard of review set by this Court in Fed. R. Civ. P. 56(c).

Further, the decision of the Eighth Circuit Court of Appeals conflicts with the decisions of the U.S. Supreme Court in *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) and *City of St. Louis v. Praprotnik* 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) and *Farmer v. Brennan* 511 U.S. 825 (1994) and decisions by the Fifth, Seventh, Ninth and Eleventh Circuits.

II. Standard of Review for Summary Judgment.

The district court's grant of summary judgment is reviewed de novo, applying the same legal standards as the district court. *Zar v. S.D. Bd. of Examiners*, 976 F.2d 459, 464 (8th Cir. 1992). The district court should be affirmed if, viewing the evidence in the light most favorable to the non-moving party, the full record discloses that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* (citing Fed. R. Civ. P. 56(c)).

In order to survive a motion for summary judgment under 42 U.S.C. §1983, the plaintiff must raise a genuine issue of material fact as to whether (1) the defendants acted under color of state law, and (2) the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right. *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002) (citing *Wade v. Goodwin*, 843 F.2d 1150, 1151-52 (8th Cir. 1988)).

III. The Eighth Circuit Court of Appeals and the District Court erred by granting Summary Judgment to the City of St. Cloud and the County of Stearns by ruling, as a matter of law, that evidence of official policies that deprived Scheelers of their Right to Access Courts is not sufficient to assert municipal liability under *Monell* and *Praprotnik*.

In *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) the Supreme Court stated,

> "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under 1983."

The Eighth Circuit Court of Appeals stated the following in their opinion,

> "In order to prevail on a 42 U.S.C. §1983 claim, the plaintiff must show that the defendant caused the deprivation of a federal right while operating under color of state law. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1426 (8th Cir. 1986) (holding that a §1983 inquiry requires consideration of "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." (quoting *Parratt v. Taylor*, 451 U.S. 527, 535 (1981))). The right of access to the courts is well-established. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). The right applies not only to the actual denial of access to the courts, but also to situations in which the plaintiff has been denied meaningful access by some impediment put up by the defendant. *Alexander v. Macoubrie*, 982 F.2d 307, 308 (8th Cir. 1992)." (App. 6).

The Eighth Circuit also stated in their opinion,

> "[i]n a section 1983 action, a municipality may only be held liable for constitutional violations which result from a policy or custom of the municipality." *Turney v. Waterbury*, 375 F.3d 756, 761-62 (8th Cir. 2004) (quoting *Yellow Horse v. Pennington County*, 255 F.3d 923, 928 (8th Cir. 2002)). The record is devoid of any evidence that the investigatory failures that the Scheelers alleged were the result of a lack of training, or a custom or practice of St. Cloud or Stearns County." (App. 10-11).

The Eighth Circuit begins by stating the law correctly. It then misapplies it to the Scheelers by holding that they need to show "lack of training, or a custom, or practice." (App. 11). The only claim Scheelers have ever asserted against the County of Stearns is that of Official Written Policy. The only claim Scheelers have ever asserted against the City of St. Cloud is that of Official Ratified Policy. There is no mention of these claims in either the District Court opinion or the Eighth Circuit panel opinion. There is no reason given for their silence on these claims.

In *Little v. City of North Miami*, 805 F.2d 962 (11th Cir. 1986), a case where the Plaintiff had alleged an adopted resolution, the District Court required plaintiff to show a "custom or usage", the Eleventh Circuit stated the following:

> "First, the district court erroneously ruled that appellant must prove a "custom or usage" of the municipality which caused the alleged constitutional infringement. *Little*, 624 F. Supp. at 772. With all due respect to the district court, this language, when applied to municipalities, refers only to situations akin to respondeat superior, where a claimant sues a city for alleged constitutional deprivations caused by municipal employees. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 2433, 85 L. Ed. 2d 791 (1985), reh'g denied, 473 U.S. 925, 106 S. Ct. 16, 87 L. Ed. 2d 695 (1985); *Monell*, 436 U.S. at 690-91, 98 S. Ct. at 2035-36; *see, e.g., Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673 (1986). In these instances, a single act attributable to improper activity of an employee is insufficient to impose vicarious liability on the municipality because of the lack of a "custom or

> policy" as defined in *Monell. City of Oklahoma City*, 471 U.S. 808, 105 S. Ct. at 2436; *Gilmere*, 774 F.2d at 1504; *see Monell*, 436 U.S. at 691, 98 S. Ct. at 2036.
>
> "In this case, the act which allegedly infringed upon appellant's first amendment rights is the resolution adopted by a local governmental body – the City Council of North Miami. As indicated, "local governing bodies . . . can be sued directly under §1983 for monetary, declaratory, and injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690, 98 S. Ct. at 2035. Viewing the facts in the light most favorable to appellant, it appears that the City Council decided that appellant was guilty of culpable conduct and decided to publicly censure him as punishment. Because we conclude that the resolution in question can be fairly characterized as "a decision officially adopted and promulgated "by the City Council of North Miami, we conclude that the minimum requirements for imposing municipal liability have been alleged. *Monell*, 436 U.S. at 690, 98 S. Ct. at 2035 (emphasis added)."

Scheelers have shown an official written policy by Stearns County, that when carried out precisely as it is written, inflicted injury to Scheelers' constitutional right to access the courts. Stearns County should be liable. Summary Judgment was not appropriate.

> "The Detective/Deputy Medical Examiner assumes the responsibility for the investigation of all unattended deaths which occur in Stearns

> County. A determination is made as to the manner and cause of all reportable deaths. This determination is achieved through a variety of postmortem examinations conducted by or at the direction of the Detective/Deputy Examiner."

This is exactly what happened in Scheelers' case. Deputy Mayavski examined the body, determined that no further assistance was needed, and without preserving critical evidence, sent the body to the funeral home. All forensic evidence of the body was destroyed, including but not limited to, high velocity blood spatter on Craig Scheelers' right palm, blood evidence and patterns on clothing, soot patterns and burns from the gun vents, and the alignment these burns and patterns had to each other. Defendants' expert Dr. McGee testified that the burns and soot on Craig Scheelers' cheek had to line up with the burns and soot on Craig Scheelers' neck and shirt at the time of the gunshot. This evidence of the exact position Craig Scheeler must have been in at the time of the gunshot was all destroyed, and of little use in trial. In fact Deputy Mayavski did not even do the most basic of tests, such as gunshot residue tests on Craig Sc' elers' hands. No gunshot residue tests were done on the witnesses' hands. Even if Deputy Mayavski thought he knew how to interpret the evidence, however wrong, Stearns County and the St. Cloud Police knew that he was not qualified to make those determinations. He was employed by both of them, as a police officer and as a deputy for the county. Evidence that a learned qualified medical doctor would recognize as foul play and preserve is destined to be destroyed under this county policy. This county policy and the resulting loss of evidence directly caused Scheelers to lose their wrongful death case against the two witnesses as explained in the Statement of the Case.

In *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) Justice Powell, in his concurring opinion states the following,

> "Difficult questions nevertheless remain for another day. There are substantial line-drawing problems in determining "when execution of a government's policy or custom" can be said to inflict constitutional injury such that "government as an entity is responsible under 1983." Ante, at 694. This case, however, involves formal, written policies of a municipal department and school board; it is the clear case."

Scheelers' claim against the County of Stearns is also one of these clear cases where formal written policy is the issue.

In *Gibson v. County of Washoe*, 290 F.3d 1175 (9th Cir. 2002), the Ninth Circuit stated that there is a direct route to *Monell* and an indirect route to *Monell*;

> "Under one route to liability, a municipality may be liable under §1983, just as natural persons are, because when Congress enacted §1983 it "intend[ed] municipalities and other local government units to be included among those persons to whom §1983 applies."[6] *Monell*, 436 U.S. at 689. To show that the municipality violated someone's rights or instructed its employees to do so, a plaintiff can prove that the municipality acted with "the state of mind required to prove the underlying violation," just as a plaintiff does when he or she alleges that a natural person has violated his federal rights. *Board of County Comm'rs*, 520 U.S. at 405. Examples of this direct path to municipal liability include: a city's policy of discriminating against pregnant women

in violation of the Fourteenth Amendment, *Monell*, 436 U.S. 658; a policymaker's order to its employees to serve capiases[*6] in violation of the Fourth Amendment, *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986); and a county policy that policymakers know will place aggressive and passive homosexuals in the same jail cell in violation of the passive homosexual's Fourteenth Amendment right to personal security. *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc)."

"Under a second route to municipality liability, a plaintiff need not allege that the municipality itself violated someone's constitutional rights or directed one of its employees to do so. Instead, a plaintiff can allege that through its omissions the municipality is responsible for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation. *Canton*, 489 U.S. at 387-89. However, because *Monell* held that a municipality may not be held liable under a theory of respondeat superior, a plaintiff must show that the municipality's deliberate indifference led to its omission and that the omission caused the employee to commit the constitutional violation. *Id.* at 387. To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation. *Farmer v. Brennan*, 511 U.S. 825, 841 (1994). Compared to the more direct route to municipal liability discussed above, "much more difficult problems of proof" are

> presented in a case where a city employee acting under a constitutionally valid policy violated someone's rights. *Board of County Comm'rs*, 520 U.S. at 406."

Scheelers argued the first route named by the Ninth Circuit in *Gibson v. County of Washoe*, 290 F.3d 1175 (9th Cir. 2002). Scheelers did not argue the second route, custom or failure to train, because Stearns County cannot train someone to become a medical doctor. No training program offered by Stearns County would suffice. Obviously, one must attend and graduate medical school. Also, Stearns County does have a properly trained medical examiner, Dr. Fredrickson. But rather than have him investigate deaths in Stearns County, it is clear from the County's written policy the responsibility for **all** unattended death investigation, determining cause and manner of death, are assigned to their untrained deputy. Only if the deputy **directs**, would anything further be done.

If the court requires Scheelers to show that the County of Stearns has a *custom* of using untrained deputies, the Scheelers have met this burden. Stearns County policy states that the deputy assumes responsibility for **all** unattended deaths in Stearns County. This cannot be interpreted as an isolated incident. If the court requires Scheelers to show that the County of Stearns acted with deliberate indifference toward Scheelers' rights, then this burden has also been met. Stearns County disregarded Minnesota Statutes §390.31 Subdivision 1 and §390.33 Subdivision 1, in assigning duties to an unqualified individual that have been mandated by Minnesota Statutes to a person holding a medical doctors degree. Stearns County was on actual or constructive notice by Minnesota

Statutes that this action would result in a constitutional harm or violation.

In *Calhoun v. Ramsey* 408 F.3d 375 (7th Cir. 2005) the Seventh Circuit stated that there are three ways that a municipality might violate §1983:

> "In *Monell v. N.Y. City Dept. of Social Servs.*, 436 U.S. 658 (1978), the Supreme Court established both the fact that "municipalities and other local government units [were] included among those persons to whom Â§1983 applies," *Id.* at 690, and the limits of such actions. Most importantly, *Monell* held that "a municipality cannot be held liable under Â§1983 on a respondeat superior theory." *Id.* at 691 Instead, municipal liability exists only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694. We have identified three different ways in which a municipality or other local governmental unit might violate §1983: (1) through an express policy that, when enforced, causes a constitutional deprivation; (2) through a "widespread practice" that although not authorized by written law and express policy, is so permanent and well-settled as to constitute a "custom or usage" with the force of law; or (3) through an allegation that the constitutional injury was caused by a person with "final decision policymaking authority." *McTigue v. City of Chi.*, 60 F.3d 381, 382 (7th Cir. 1995). The express policy theory applies, as the name suggests, where a policy explicitly violates a constitutional right when enforced. *See Monell*, 436 U.S. at 658."

Scheelers have met this first *Monell* claim, in accordance with the Seventh Circuit. The County of Stearns had a formal policy that, when enforced, caused Scheelers' constitutional deprivation.

Scheelers have also shown an official ratified policy by City of St. Cloud. Chief O'Keefe, official policymaker for the police department, has ratified and approved the actions of his officers publicly in a newspaper article. City officials have ratified the actions of all defendants by claiming a "diligent and thorough" investigation (App. 29). The U.S. Supreme Court stated in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988);

> " . . . when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."
>
> "A failure to carry out a stated policy could show that a municipality's actual policies were different from those that were announced. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988), (stating, among others, that a refusal to follow an announced policy could help show what the actual policy of the municipality is)."

In *Hopper v. City of Pasco*, 241 F.3d 1067, (9th Cir. 2001) the Court stated:

"As we have noted, there are three ways to meet *Monell's* policy or custom requirement: First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal government policy or a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (internal quotation omitted).... Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with "final policy-making authority" and that the challenged action itself thus constituted an act of official government policy. *See Pembaur*, 475 U.S. at 48081; *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983).... Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it. *See Praprotnik*, 485 U.S. at 127; *Hammond v. County of Madera*, 859 F.2d 797, 801-02 (9th Cir. 1988); *Gillette*, 979 F.2d at 1346-47."

"Here, because the art program was not the product of any formal policy or longstanding practice, *Hopper* and Rupp must either show that the city manager was a final policymaker with respect to the arts program or that the city council ratified his decision to exclude the works. Because there are material facts in dispute as to this issue, we remand to the district court for resolution of *Monell* liability."

Scheelers have met this third criterion against the City of St. Cloud and the County of Stearns.

In *Grandstaff v. The City of Borger*, 767 F.2d 161 (5th Cir. 1985) the Fifth Circuit concluded the following in this case of the use of deadly weapons:

> "The disposition of the policymaker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made."

> "This reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his disposition prior to August 11. *See* 2 Wigmore, Evidence §§382, 437 (Chadbourn rev. 1979). As subsequent conduct may prove discriminatory motive in a prior employment decision, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), and subsequent acts may tend to prove the nature of a prior conspiracy, *see Anderson v. United States*, 417 U.S. 211, 219, 94 S. Ct. 2253, 2260, 41 L. Ed. 2d 20 (1974), so the subsequent acceptance of dangerous

> recklessness by the policymaker tends to prove his preexisting disposition and policy."
>
> "After August 11, 1981, we all know of the dangerous recklessness of that police force. If the police chief had not known and approved of it beforehand, we would expect a change when he, too, learned the facts. But there is no sign of any concern except that the City avoids liability. The jury was entitled to infer that the conduct on the 6666 Ranch demonstrated the policy of the Borger city police force as approved by its policymaker, both before and after that time."

In the present case, all of the defendants have shown the courts that even after the State of Minnesota Crime Victims Ombudsman's investigation made known the extreme failures of the St. Cloud Police Department (App. 50), they still approve of those actions (App. 29).

IV. The Eighth Circuit Court of Appeals and the District Court erred by granting Summary Judgment to the City of St. Cloud and the County of Stearns by ruling, as a matter of law, that evidence proving state actors had time to deliberate and objective knowledge of a risk of injury to Scheelers' Right to Access Courts will not satisfy the test of deliberate indifference set forth in *Farmer*.

The analysis is whether Scheelers presented credible evidence that, if true, would support a finding of deliberate indifference under 42 U.S.C. §1983. Assuming then that everything contained in the report of the Ombudsman is true, the entire report supports a finding of deliberate indifference toward Scheelers' Right of Access to Courts.

The Eighth Circuit Court of Appeals states the correct legal standard to analyze the Motion for Summary Judgment but then fails to properly apply it (App. 1). The Court very clearly did not view the record in a light most favorable to Scheelers. Instead, the Court adopts the Defendants' version of the facts and dismisses Scheelers' version of the facts.

In *Berry v. Baca*, 379 F.3d 764 (9th Cir. 2004) the court explains "The Role of the Judge at Summary Judgment":

> "There is an additional, related basis for concluding that *Brass* is distinguishable. It is difficult to square the district court's interpretation of *Brass* with the appropriate role of the judge at summary judgment. The Supreme Court has warned that at summary judgment, "[c]redibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In the context of *Monell* claims of deliberate indifference, we have held that, "Whether a local government has displayed a policy of deliberate indifference to the constitutional rights of its citizens is generally a jury question." *Gibson v. County of Washoe*, 290 F.3d 1175, 1194-95 (9th Cir. 2002).

The Eighth Circuit Court of Appeals, in their opinion (App. 1), recognized that the right to access the courts was clearly established, and that Scheelers' case turns on whether the defendants acted recklessly toward that right. It states the following:

> "We find *Wilson* a useful analogue for analyzing the Scheelers' claim, as both involve the failure

> to properly investigate a potential crime scene.*fn2 Wilson involved the denial of the fundamental right to liberty, *Wilson*, 260 F.3d at 956 n.8, but the Scheelers' right to access the courts is no less fundamental, *see, e.g.*, U.S. Const. amend. I (recognizing the "right to petition the Government for redress of grievances"). Accordingly, we next consider whether the defendants had the opportunity to deliberate during the investigation, and, if so, whether they acted recklessly with regard to the Scheelers' right to access the courts. *Wilson*, 260 F.3d at 956-57. In other words, the Scheelers must show that the defendants displayed a deliberate indifference to their right to access the courts through their investigation of Craig's death." (App. 8).

In *Farmer v. Brennan*, 511 U.S. 825 (1994) the Supreme Court stated:

> "The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk that is either known or so obvious that it should be known."

The Eighth Circuit Court of Appeals clearly did not view the evidence in light most favorable to Scheelers when it determined that the record does not show deliberate indifference. The panel based this determination on their finding that the St. Cloud Police did a "thorough investigation", and "preserved most of the evidence." (App. 9). The court also determined that there were no outstanding discrepancies to clear up through additional forensic testing (App. 10).

Under Minnesota law, the State of Minnesota Crime Victims Ombudsman has the right to investigate the

internal files, policies, training and review the investigation into the death of Scheeler by the St. Cloud Police (App. 53). Having done this, they found a failure to investigate the death of Craig A. Scheeler and a failure to follow training and department policies (App. 56). In fact it states that they made hasty determinations in (App. 58), quickly surrendered the scene (App. 65), and never investigated Craig Scheelers' death as a possible homicide (App. 54). The Ombudsman report quotes Chief O'Keefe as saying "the police treat each suicide as a suspicious death when it comes to crime scene processing and assigning investigatory resources. That means preserving the scene, restricting access, treating the body as evidence that cannot be contaminated. It means getting a search warrant." Also, "the body is evidence in these types of investigations." (App. 57). The Ombudsman report goes on to say that none of these actions were done in Craig Scheelers' case (App. 57). Nowhere in the record do defendants ever claim to have preserved most of the evidence, or deny Scheelers' specific allegations about non-preservation. The Ombudsman's report states that due to the actions of the St. Cloud Police "if the victim's death were something other than a self-inflicted gunshot wound, little if any evidence would be available to obtain a conviction." (App. 54). For the court to determine the officers preserved most of the evidence and give credit to the St. Cloud Police for it, is inappropriate. The Eighth Circuit panel also determined that there were no outstanding discrepancies to clear up through additional forensic testing (App. 10). Certainly the issue of *who shot Scheeler*, was one issue that should have been considered important enough to inspire further forensic tests and preservation of available and known evidence (police reports and photos). The State of Minnesota Ombudsman's report states that as a result

of the St. Cloud Police failing to follow department policies and procedures, "the facts behind the victim's death may never be known." (App. 56). This highly credible report contradicts the findings of the Eighth Circuit Court of Appeals.

The St. Cloud Police were required to respond to the Ombudsman Report (App. 60). The police do not directly deny any of the findings. Rather, the defendants cloak themselves in general explanation of "diligent and thorough" investigation (App. 29). If there is no dispute over the specific allegations of allowing known evidence (shown in photos taken by police) of the scene and body to be destroyed, then the only dispute is whether such an investigation is deliberately indifferent to Scheelers' constitutional rights or whether such an investigation is a diligent and thoughtful investigation. The Panel simply adopted Defendants' position, almost verbatim, and set aside Scheelers' credible evidence of the Ombudsman investigation of the St. Cloud Police.

The Eighth Circuit Court of Appeals supports their conclusion by noting that several years after the fact other third persons did not come to a different conclusion (App. 9). It is no surprise that someone who did not look outside the selected files, reports or photographs that were offered to them would opine consistent with the conclusions of the authors of the reports. Token inadmissible interviews and opinions several years later do not restore the Scheelers' Right to Access Courts. The damage and thus the violation were done at the beginning. This bell cannot be un-rung. It is disingenuous for the police to claim that they were correct in their conclusions that Craig Scheeler shot himself by referring to their own documentation of their own deficient investigation.

The Eighth Circuit Court of Appeals determination that the St. Cloud Police did a thorough investigation (App. 9), in no way explains Dr. Fredrickson's deliberate indifference to Scheelers. Dr. Fredrickson works for Stearns County, not St. Cloud, and had no involvement in the investigation, other than to sign the death certificate. Dr. Fredrickson stated at a meeting between the Stearns County officials and Scheelers that he relied solely on Lee Mayavski, the untrained deputy. Someone in Dr. Fredrickson's position, as Chief Medical Examiner, certainly understands the potential harm of an unqualified person determining cause and manner of death, or relying solely on a phone call with an unqualified person to make the determination from. Dr. Fredrickson knows or should know the mandates of the Minnesota Statutes placed upon him. Disregarding them shows deliberate indifference, regardless of the St. Cloud Police's conduct. This deliberate disregard for Scheelers' rights caused all evidence of the body to be destroyed or compromised.

Police Chief O'Keefe has publicly condoned his officers' actions. Again, if the Ombudsman report be true, then Chief O'Keefe has ratified a policy of failure to investigate, failure to preserve evidence, failure to follow training, failure to follow policies, quickly surrendering the scene and jumping to a conclusion. A reasonable person in his position would never condone such things. He could not do this without showing deliberate indifference to Scheelers' rights.

The Eighth Circuit Court of Appeals also determined that although the Ombudsman chastises the St. Cloud Police for the way they handled the scene and for violating their department policies, that this does not establish

deliberate indifference (App. 9). The Report of the State of Minnesota Office of Crime Victims Ombudsman (App. 50) is offered for the purpose of proving that the conduct of Defendants occurred in a setting where they were knowledgeable through training and department policies as to how to handle a violent death scene. They had the luxury of time and unhurried decisions. They knew the adverse consequence of failing to preserve known evidence or treat the shooting scene as a potential crime and had time to reflect on their decisions.[1] This very credible report by a disinterested party should not be set aside because the Ombudsman was looking for mistreatment of Scheelers rather than deliberate indifference per se. The facts of the report support deliberate indifference. The Ombudsman concludes that Scheelers' allegations (App. 53) were justified (the acts did occur) (App. 58). Accordingly, the Court must assume as true that defendants knew or should have known to investigate all violent deaths as homicides. Defendants knew the adverse affects of not preserving evidence of the scene and the body. Defendants' arguments and proffers to the contrary must be considered as but a part of the dispute, not the basis for a conclusion of fact in a summary judgment motion.

The District Court of Minnesota also stated that the defendants were entitled to qualified immunity (App. 44). In *Harlow, et al. v. Fitzgerald*, 457 U.S. 800, 103 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the Supreme Court held the following:

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[1] Indeed, it would be reasonable to assume that Defendants' policies and training are designed in the first place to protect rights and avoid constitutional deprivations under 42 U.S.C. §1983 or any other law.

> "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."

Assuming then that the defendants are reasonably competent, they should be aware of Scheelers' right to access the courts. Defendants being Chief of Police, Medical Examiner, Technician and investigators for the Criminal Investigation Division, know the importance of investigating and preserving all potential homicides. There cannot be any meaningful and successful argument that the Defendants were not aware that their failure to collect and preserve the forensic evidence surrounding the violent death of Craig Scheeler would be a violation of the Scheelers' Right of Access to Courts at the time of their wrongful conduct on March 24, 1997. The officers were all experienced professionals. With only two witness statements supporting their conclusion that Scheeler shot himself (App. 54), it is clearly reckless to not develop the mountains of evidence available at the scene and about the body, and allow the destruction of it without any further investigation.

In a case that is almost parallel to Scheelers' case, the Tenth Circuit stated the following in *Stump v. Gates*, et al., unpublished (1993 U.S. App. Lexis 2509):

> "In order for a right to have been clearly established, this court requires "some, but not necessarily precise, factual correspondence" between cases predating the alleged violation and the facts of the case in question. *Calhoun v. Gaines*, No. 91-6152, 1992 WL 387385, at 4 (10th Cir. Dec. 30, 1992). "In essence, this standard requires officials to know well developed legal principles and to relate and apply them to analogous

factual situations." *Id.* The parties naturally characterize the qualified immunity issue differently. We believe however, that the appropriate statement of that issue in the context of the allegations of the complaint is whether a reasonable officer would have known at the time of Ocants' death that a deliberate failure to investigate and quick destruction of evidence that might have proved homicide was a violation of the decedent's children's right of access to the courts."

V. The parties did not engage in any discovery prior to the Motion for Summary Judgment.

It should be noted that the parties did not engage in any discovery prior to the Motion to Dismiss and/or Summary Judgment. The Scheelers agreed to delay their discovery while a Motion to Dismiss was prepared, argued and decided. No mention of arguing for Summary Judgment was made when Scheelers agreed to stay their discovery. Accordingly, Scheelers have been subjected to an adverse summary judgment decision without having completed any discovery.

CONCLUSION

Petitioner respectfully requests that this Court grant this petition for writ of certiorari and reverse the decisions of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota and directing the matter to be remanded to the District Court for further proceedings.

Respectfully submitted,

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United States Court of Appeals,
FOR THE EIGHTH CIRCUIT

No. 04-2800

Delroy C. Scheeler, individually and on behalf of Craig A. Scheeler; Rhonda L. Scheeler, individually and as Trustee on behalf of Craig A. Scheeler,

Appellants,

v.

City of St. Cloud, Minnesota; County of Stearns, Minnesota; Dennis O'Keefe, individually and in his former official capacity as Chief of Police for the City of St. Cloud, Minnesota; Larry Meyer, individually and in his former official capacity as Mayor of the City of St. Cloud, Minnesota; David Fredrickson, individually and in his official capacity as Medical Examiner for the County of Stearns, Minnesota; Lee Mayavski, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota and a Deputy Medical Examiner for the County of Stearns, Minnesota; David Johnson, individually and in his official

Appeal From the United States District Court for the District of Minnesota.

capacity as a Police Officer for *
the City of St. Cloud, Minnesota; *
Gary Leininger, individually and *
in his official capacity as a Police *
Officer/Evidence Technician for *
the City of St. Cloud, Minnesota; *
David LaBeaux, individually *
and in his official capacity as *
a Police Officer for the City of *
St. Cloud, Minnesota, *
*
Appellees.

Submitted: Feb. 14, 2005.
Filed: March 31, 2005.

Before MELLOY, HEANEY, and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

Delroy C. and Rhonda L. Scheeler (the Scheelers) brought a claim pursuant to 42 U.S.C. § 1983 against the City of St. Cloud, Stearns County, and various city and county officials (the defendants) after the death of their son, Craig Scheeler. Craig Scheeler died after suffering a gunshot wound to his head. The police investigation concluded that the wound was accidentally self-inflicted when Craig Scheeler was playing Russian Roulette. The Scheelers maintain that someone else shot Craig, and that the defendants' failure to properly investigate the circumstances of Craig's death impeded their ability to bring a wrongful death claim against the assailant, denying them their constitutional right to access the courts. The district

court[1] granted summary judgment to the defendants. We affirm.

BACKGROUND

On March 24, 1997, nineteen-year-old Craig Scheeler died of a gunshot wound to the head. Leslie Wolf and Aaron Marshall were present at Craig's house at the time of the shooting. Although the factual circumstances surrounding the shooting are in dispute, it is undisputed that Craig was hit with a single bullet, which entered his right temple and exited through the top of his skull. Shortly thereafter, emergency personnel arrived in response to a 911 call from Craig's residence. St. Cloud police officers Mark Moline and David Missell were the first to arrive at the house, and began performing first aid on Craig, who was still alive. When an ambulance arrived, Gold Cross emergency medical technicians tended to Craig, and the officers turned their attention to the scene. Gary Leininger, an evidence technician with the St. Cloud Police Department, also investigated the scene. Among other things, he recovered the gun and fingerprinted it, collected live ammunition rounds, took a blood sample from the floor, found a bullet fragment on the floor, and took photographs of the area.

Sergeant David LaBeaux arrived and tape recorded an interview with Marshall. Lee Mayavski, another St. Cloud officer and also the Stearns County deputy medical examiner, interviewed Wolf, but was unable to record the

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[1] The Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota, presiding over the matter pursuant to 28 U.S.C. § 636(c).

interview because of an equipment malfunction. Mayavski checked in with the St. Cloud Hospital, which informed him that Craig had died as a result of the gunshot wound. Mayavski then proceeded to the hospital, where he spoke with David Fredrickson, the Stearns County medical examiner. Mayavski performed further observations of Craig's hands and gunshot wounds, and determined that an autopsy was unnecessary. Based on the investigation conducted up to this point, the medical examiner's office and the police concluded that the shooting was accidental.

On June 27, 1997, Mayavski met with the Scheelers. According to his report, the Scheelers "feel that the police investigation is inconsistent [with] their investigation [and] findings." (Appellant's App. at 115.) The Scheelers believed that Craig may have been the victim of a homicide, and were conducting their own investigation and analysis of the crime scene. The Scheelers had heard "third- or fourth-hand" that Craig was the target of a gang hit. (*Id.* at 116.) Mayavski and the St. Cloud Police Department followed up on these concerns over the next several years by: sending case files to forensics expert Tom Bevel; requesting that the FBI test the gun; having the Ramsey County medical examiner independently review the case; submitting the matter to the Benton County Attorney's office to determine if any criminal charges were appropriate; and conducting a full series of interviews with Wolf, Marshall, and a number of other friends and associates of Craig's, as well as checking other potential leads. None of this additional investigation yielded results inconsistent with the defendants' initial conclusion that Craig had accidentally shot himself.

In 2000, the Scheelers brought a wrongful death claim in Minnesota state court alleging that Wolf, Marshall, and

unknown third persons shot Craig. The matter proceeded to trial on April 21, 2003. On April 30, 2003, the jury returned a verdict in favor of the defendants, finding, by way of a special verdict form, that "Craig A. Scheeler place[d] his handgun to his head and pull[ed] the trigger, causing it to discharge into his head, this being the sole direct cause of his death[.]" (*Id.* at 26.) The Scheelers appealed. The Minnesota Court of Appeals affirmed, and the Minnesota Supreme Court denied review. *See Scheeler v. Wolf*, 2004 WL 2094367 (Minn. Ct. App. Sept. 21, 2004).

On July 29, 2003, the Scheelers brought this civil rights claim in district court. The essence of their claim is that the defendants have denied them meaningful access to the courts by failing to properly investigate Craig's death. This, they contend, has "precluded and interfered with [their] exercise of a constitutionally protected right to bring a wrongful death action in Minnesota State District Court against the individual that killed Craig A. Scheeler." (Appellant's App. at 13.) The defendants moved to dismiss or for summary judgment. The district court concluded that the defendants were entitled to summary judgment, both on the merits and by way of the doctrine of qualified immunity, because the Scheelers could not show that the defendants failed to perform any aspect of the investigation based on deliberate indifference. The court further held that the municipality claims against St. Cloud and Stearns County additionally failed because municipalities are not "persons" within the meaning of § 1983. The Scheelers appeal.

ANALYSIS

We review the district court's grant of summary judgment de novo, applying the same legal standards as the district court. *Zar v. S.D. Bd. of Examiners*, 976 F.2d 459, 464 (8th Cir. 1992). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In order to prevail on a § 1983 claim, the plaintiff must show that the defendant caused the deprivation of a federal right while operating under color of state law. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1426 (8th Cir. 1986) (holding that a § 1983 inquiry requires consideration of "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." (quoting *Parratt v. Taylor*, 451 U.S. 527, 535 (1981))). The right of access to the courts is well-established. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). The right applies not only to the actual denial of access to the courts, but also to situations in which the plaintiff has been denied meaningful access by some impediment put up by the defendant. *Alexander v. Macoubrie*, 982 F.2d 307, 308 (8th Cir. 1992).

While the right to access the courts exists, the Supreme Court and our court have recognized that the constitutional basis for the right is "unsettled." *Harbury*, 536 U.S. at 415; *Harrison*, 780 F.2d at 1427 n.7. In some circumstances, our circuit has held that the right to access derives from the First Amendment. *See, e.g., Whisman v. Rinehart*, 119 F.3d 1303, 1312-13 (8th Cir. 1997); *Harrison*,

780 F.2d at 1427. In order to prevail on such a claim, the Scheelers must show that the defendants acted with some intentional motivation to restrict their access to the courts. *See Whisman*, 119 F.3d at 1313 (stating that right-to-access cause of action requires proof of government action "designed" to prevent access to the courts); *Harrison*, 780 F.2d at 1428 (holding that plaintiff sufficiently pled a valid right-to-access claim by alleging that city employees retaliated against them for filing a lawsuit).

Reviewing the record in the light most favorable to the Scheelers, we find nothing in it to indicate that the defendants intentionally conspired to keep the Scheelers out of court. Indeed, the Scheelers themselves do not suggest they could clear this hurdle. Instead, they argue that their right-to-access claim ought to be analyzed under the Due Process Clause, and that they could thus prevail by showing that the defendants were deliberately indifferent to their right to access the courts. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 850-51 & n.9 (1998) (noting that an official who has an actual opportunity to deliberate may be liable for a substantive due process violation for undertaking actions that are deliberately indifferent to the constitutional rights of another).

The Supreme Court has noted that the right to access the courts finds support in many parts of the Constitution, including the Due Process Clause. *Harbury*, 536 U.S. at 415 n.12. The overwhelming majority of cases involving a due process analysis, though, arise in the prison-litigation context, as in situations where a prisoner's access to counsel, mail, or the law library has been curtailed. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) (considering an inmate's access-to-courts claim under the Due Process Clause). We have found no cases from our circuit

that have analyzed a claim like the Scheelers' under the Due Process Clause.

In *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001), the plaintiff alleged that his due process rights were violated by the defendants' failure to investigate potential leads in a homicide case, resulting in his wrongful imprisonment. Our court recognized that "[t]he general test of whether executive action denying a liberty interest is egregious enough to violate due process is whether it shocks the conscience." *Id.* at 956 (footnote omitted). This determination turns on whether the state actor had the opportunity to deliberate before selecting a course of conduct; if so, the plaintiff may prevail where the actor was deliberately indifferent to a fundamental right held by the plaintiff. *Id.*; *Terrell v. Larson*, 396 F.3d 975, 978 n.1 (8th Cir. 2005) (en banc). Thus, we held that the plaintiff in *Wilson* could go forward on his failure-to-investigate claim brought pursuant to the Due Process Clause if he could show that the actions of the investigating officers "shock[ed] the conscience." *Wilson*, 260 F.3d at 956.

We find *Wilson* a useful analogue for analyzing the Scheelers' claim, as both involve the failure to properly investigate a potential crime scene.[2] *Wilson* involved the denial of the fundamental right to liberty, *Wilson*, 260 F.3d at 956 n.8, but the Scheelers' right to access the courts is no less fundamental, *see, e.g.*, U.S. Const. amend. I

[2] Although the Supreme Court has expressed reluctance toward the expansion of substantive due process rights, *Lewis*, 523 U.S. at 842, we have no such concern here. The Scheelers' claim is essentially that they have been denied "a meaningful opportunity to be heard," a right long recognized under the Due Process clause. *See Broddie v. Connecticut*, 401 U.S. 371, 377 (1971).

(recognizing the "right to petition the Government for redress of grievances"). Accordingly, we next consider whether the defendants had the opportunity to deliberate during the investigation, and, if so, whether they acted recklessly with regard to the Scheelers' right to access the courts. *Wilson*, 260 F.3d at 956-57. In other words, the Scheelers must show that the defendants displayed a deliberate indifference to their right to access the courts through their investigation of Craig's death.

After carefully reviewing the record, we cannot agree that the defendants' investigation evinces deliberate indifference. The police conducted a thorough investigation at the scene, interviewed potential witnesses, and photographed and preserved most of the evidence. Later, when the Scheelers expressed dissatisfaction with the investigation, the police reopened it, reinterviewed witnesses, reassessed their prior conclusions, and ended up with the same result. Then, when again pressed to come to a different conclusion based on the Scheelers' interpretation of the physical evidence, the police sent the evidence to the Benton County Attorney, the Ramsey County Medical Examiner, and a forensics expert. None of these independent parties came to a different conclusion than the original one proffered by the St. Cloud and Stearns County officials after their initial investigation: Craig Scheeler died by shooting himself.

The Scheelers point to specific facets of the investigation that they claim show the defendants' deliberate indifference, such as the failure to perform an autopsy or test the apparent blood spatters on Craig's hands. They also direct us to a report from the Minnesota Crime Victims Ombudsman, which chastises the police for not immediately treating the scene as a crime scene and

violating its own departmental policies. We cannot agree that these allegations establish deliberate indifference. First, there were no outstanding discrepancies to clear up through additional forensics testing; all signs pointed to a gun accident, and each step of the investigation confirmed that. As to the Ombudsman's report, "alleged violations of state laws, state-agency regulations, and even state court orders do not by themselves state a claim under 42 U.S.C. § 1983." *Whisman*, 119 F.3d at 1312. Certainly, the Ombudsman's report may have confirmed the Scheelers' view that the police could have handled the investigation more professionally, but it provides no independent basis for a civil rights claim against the defendants.[3]

Lastly, the district court held that even if the individual suits survived, the Scheelers could not make out a case against the municipal defendants because they were not "persons" within the meaning of § 1983. The Scheelers assert that the city and county should be considered "persons" and thus subject to § 1983 liability. They are correct. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978) (characterizing local government as "persons" subject to liability under § 1983). It remains true, however, that "[i]n a section 1983 action, a municipality may only be held liable for constitutional violations which result from a policy or custom of the municipality." *Turney v. Waterbury*, 375 F.3d 756, 761-62 (8th Cir. 2004) (quoting *Yellow Horse*

[3] The district court alternatively dismissed the case on the basis of qualified immunity. In order to overcome the defense of qualified immunity, the Scheelers must first establish that they have "alleged a deprivation of a constitutional right at all." *Lewis*, 523 U.S. at 841 n.5. As outlined above, they cannot clear this first hurdle: there is nothing to indicate that the defendants either intentionally subverted or were deliberately indifferent to the Scheelers' right to access the courts.

v. Pennington County, 255 F.3d 923, 928 (8th Cir. 2002)). The record is devoid of any evidence that the investigatory failures that the Scheelers alleged were the result of a lack of training, or a custom or practice of St. Cloud or Stearns County. Indeed, the Ombudsman's report states that the St. Cloud Police Department "violated its own policy" by neglecting to view Craig's house as a potential crime scene. (Appellant's App. at 332.) We find no error in the district court's dismissal of the municipal defendants.

CONCLUSION

Eight years ago, Craig Scheeler died from a gunshot wound to his head. All of the investigations conducted by St. Cloud, Stearns County, Benton County, the Ramsey County Medical Examiner, the FBI, and an independent forensic analyst, have supported the conclusion that he accidentally killed himself. Nonetheless, the Scheelers claim that the investigation was deliberately indifferent to their right to access the courts. We disagree. None of the alleged deficiencies in the investigation reflect a deliberate indifference on the part of the defendants, and we thus affirm the district court's grant of summary judgment in their favor.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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ORDER

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Delroy Scheeler, individually and on behalf of Craig Scheeler, and Rhonda L. Scheeler, individually and as Trustee on behalf of Craig A. Scheeler,

Plaintiffs,

vs.

City of St. Cloud, Minnesota, County of Stearns, Minnesota, Dennis O'Keefe, individually and in his former capacity as Chief of Police for the City of St. Cloud, Minnesota, Larry Meyer, individually and in his former capacity as Mayor of the City of St. Cloud, Minnesota, Dr. David Fredrickson, individually and in his official capacity as Medical Examiner for the County of Stearns, Minnesota, Lee Mayavski, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota, and a Deputy Medical Examiner for the County of Stearns, Minnesota, David Johnson, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota, Gary Leininger, individually and in his official capacity as a Police Officer/Evidence Technician for the City of St. Cloud, Minnesota,

David LaBeaux, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota,[1]

Defendants. Civ. No. 03-2505 (RLE)

* * * * * * * * * * * * * * * * * * * *

At Duluth, in the District of Minnesota, this 14th day of June, 2004.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to the consent of the parties, as authorized by the provisions of Title 28 U.S.C. §636(c), upon the Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.

On February 5, 2004, the Court heard argument on the Defendants' Motion and, at the time of the Hearing, the Plaintiffs appeared by Ronald J, Walsh, Esq.; the Defendants City of St. Cloud, Dennis O'Keefe, Larry Meyer, Lee Mayavski, David Johnson, Gary Leininger, and David Labeaux appeared by Michael T. Milligan, Esq.; and the Defendants County of Stearns, and Dr. David Fredrickson, appeared by Jon K. Iverson, Esq.

For the reasons which follow, we grant the Defendants' Motion for Summary Judgment.

[1] On December 1, 2003, the District Court, the Honorable Donovan W. Frank presiding, issued an Order terminating Leslie Paul Wolf, and Aaron Gregory Marshall, as Defendants in this action. See, *Docket Nos. 11 & 12.* Thus, neither Wolf, nor Marshall, are parties to this litigation.

II. Factual Background

This action was brought, pursuant to Title 42 U.S.C. §1983, by Delroy Scheeler, and Rhonda Scheeler (the "Scheelers"), who commenced this action individually, and on behalf of their son, Craig Scheeler, who is deceased. Rhonda Scheeler also brings this action as the Trustee for the Estate of Craig Scheeler. The Scheelers assert that the Defendants denied them access to the Courts, in violation of Section 1983; and that the Defendants conspired to conceal Craig Scheeler's cause of death, in violation of Section 1983. The Scheelers also assert a Minnesota State law claim for conspiracy.

The Scheelers' claims arise out of the death of their son Craig Scheeler, who died on March 24, 1997 from a single gunshot wound to his head. The Scheelers dispute the Defendants' version of the circumstances of their son's death, but what is not disputed is that Craig Scheeler was shot in his home, and that Leslie Paul Wolf ("Wolf"), and Aaron Gregory Marshall ("Marshall"), were also present in the home at the time of the shooting.

After the investigation of Craig Scheeler's death was completed, the Stearns County Medical Examiner's Office determined that his death had been accidental. See, *Affidavit of Jon K. Iverson in Support of Motion to Dismiss or Alternatively, Summary Judgment* (Iverson Affidavit"), *Ex. 2.* Since his death, the Scheelers' contend, however, that "another party shot Craig A. Scheeler." *Complaint,* at p. 2.

In or about March of 2000, the Scheelers brought a wrongful death lawsuit in Minnesota State Court against Wolf, Marshall, and unknown third parties. From April 21, 2003, to April 30, 2003, a Jury Trial was held in the State

Court. On April 30, 2003, the Jury returned its Verdict. The Jury found that, on March 24, 1997, Craig Scheeler had placed a handgun to his head and had pulled the trigger, thereby causing his own death, and that this act was the sole direct cause of his death. On September 19, 2003, the State District Court for the Seventh Judicial District of Minnesota, the Honorable Thomas Knapp presiding, denied the Scheelers' Motion for Judgment Notwithstanding the Verdict. See, *Iverson Affidavit Ex 1.*

On March 20, 2003, the Scheelers commenced this lawsuit. The Scheelers allege that the Defendants have "engaged in a course of egregious and deliberate conduct in investigating, the cause of death of Craig Scheeler," such that the Defendants have precluded and interfered with the Scheelers' right of access to the Courts. *Complaint,* at p. 2. In essence, the Scheelers argue that, but for the inadequacies of the Defendants' investigation of their son's death, the outcome of the State Court Jury Trial would have been different because they would have been armed with sufficient evidence to prove their claims against Wolf and Marshall before the State Court Jury. Therefore, the Scheelers contend that, while they were allowed to fully litigate their claims, their access to the Courts was not "meaningful." *Id.*

The Scheelers also contend that the Defendants conspired, under both Federal and State law, to conceal the true cause of their son's death. Specifically, the Scheelers assert that the "Defendants failed to properly investigate the cause of death of Craig A. Scheeler as a homicide." *Complaint,* at p. 3.

In turn, the Defendants seek a dismissal of, or Summary Judgment on, all of the Scheelers' claims.

III. Discussion

The Defendants argue that this action should be dismissed because the Scheelers have failed to state a claim upon which relief can be granted. Alternatively, the Defendants maintain that no genuine issue of material fact exists and that, therefore, they are entitled to the entry of Summary Judgment on the Scheelers' claims against them. The Defendants also assert that the Scheelers' wrongful death action against Wolf and Marshall precludes them from relitigating the issues that were decided in State Court. Finally, the Defendants contend that the individual Defendants are entitled to qualified immunity, and that the City of St. Cloud, and the County of Stearns, are not liable under Section 1983, We address each of the Defendants' arguments in turn, commencing with the Defendants' substantive challenge to the Scheelers' claims.

A. *The Defendants' Motion for Summary Judgment.*

In support of their Motion, the Defendants have submitted the Iverson Affidavit, which contains 27 Exhibits. Generally, a Court may not consider "matters outside the pleadings" on a Rule 12(b)(6) Motion to Dismiss without converting that Motion to one for Summary Judgment See, *Rule 12(b)(6), Federal Rules of Civil Procedure;* see also *Trimble v. Asarco. Inc.*, 232 F.3d 946, 955 (8th Cir. 2000). Since we have reviewed all of the parties' submissions, including the entirety of the Exhibits attached to the Iverson Affidavit, and the thirteen Exhibits included in the "Schedule of Plaintiffs' Exhibits" ("Plaintiffs' Exhibits"), see *Docket No. 17,* and since we have considered those materials in reaching our disposition of

the Motion, we construe the Defendants' Motion as one for Summary Judgment.

1. *Standard of Review.* Summary Judgment is not an acceptable means of resolving triable issues, nor is it a disfavored procedural shortcut when there are no issues which require the unique proficiencies of a Jury in weighing the evidence, and in rendering credibility determinations. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). Summary Judgment is appropriate when we have viewed the facts, and the inferences drawn from those facts, in a light most favorable to the nonmoving party, and we have found no triable issue. See, *Luigino's Inc. v. Peterson,* 307 F.3d 909, 911 (8th Cir. 2003); *Duffy v. McPhillips,* 276 F3d 988, 991 (8th Cir. 2002); *Schoolhouse Inc. v. Anderson,* 275 F.3d 726, 728 (8th Cir. 2002); *Krentz v. Robertson Fire Protection Dist.,* 228 F.3d 897, 901 (8th Cir. 2000).

For these purposes, a disputed fact is "material," if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is "genuine," if the evidence is such that a reasonable Jury could return a Verdict for the non-moving party. See, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Herring v. Canada Life Assurance,* 207 F.3d 1026, 1028 (8th Cir. 2000); *Austin v. Minnesota Mining and Manuf. Co.,* 193 F.3d 992, 995 (8th Cir. 1999); *Liebe v. Norton,* 157 F.3d 574, 578 (8th Cir. 1998); *Peter v. Wedl,* 155 F.3d 992, 996 (8th Cir. 1998).

As Rule 56(e) makes clear, once the moving party files a properly supported Motion, the burden shifts to the nonmoving party to demonstrate the existence of a genuine

dispute. In sustaining that burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial." *Rule 56(e), Federal Rules of Civil Procedure;* see also, *Anderson v. Liberty Lobby, Inc.*, supra at 256; *Allen v. Entergy Corp.*, 181 F.3d 902, 904 (8th Cir. 1999); *Jaurequi v. Carter Manufacturing Co.*, 173 F.3d 1076, 1085 (8th Cir. 1999). Moreover, the movant is entitled to Summary Judgment where the nonmoving party has failed "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, supra at 322; see *Hammond v. Northland Counseling Center, Inc.*, 218 F.3d 886, 891 (8th Cir. 2000); *Greer v. Schoop*, 141 F.3d 824, 826 (8th Cir. 1998). No genuine issue of fact exists in such a case because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, supra at 323; see also, *Bell Lumber and Pole Co. v. United States Fire Ins. Co.*, 60 F.3d 437, 441 (8th Cir. 1995); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 510 (8th Cir. 1995); *Settle v. Ross*, 992 F.3d 162, 163 (8th Cir. 1993).

2. *Legal Analysis.* We address each of the Scheelers' claims in turn, commencing with their claim that the Defendants denied them meaningful access to the Courts, in violation of Section 1983.

a. *The Access to the Courts Claim.* Indisputably, there is a constitutional right of access to the Courts. See, *Whisman Through Whisman v. Rinehart*, 119 F.3d 1303, 1313 (8th Cir. 1997) ("[A]ccess to the courts is a

fundamental right of every citizen."). In this Circuit, that right of access is viewed as a component of the First Amendment right to petition the government for redress of grievances. See, *Harrison v. Springdale Water & Sewer Commission,* 780 F.2d 1422, 1426 (8th Cir. 1986); see also, *Ringsred v. City of Duluth,* 187 F. Supp.2d 1141, 1156-57 (D. Minn. 2001) aff'd, 39 Fed.Appx. 480, 2002 WL 1379100 (8th Cir., June 27, 2002), cert. denied, 537 U.S. 1107 (2003); *In re Workers Compensation Refund,* 842 F. Supp. 1211, 1219 (D. Minn. 1994), aff'd, 46 F.3d 813, 822 (1995). As our Court of Appeals has explained:

> An individual's constitutional right of access to the courts "cannot be impaired, either directly * * * or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. It is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." Sanders [v. St. Louis County], 724 F.2d [665, 666 (8th Cir.1983)]. The cases from this Circuit, as well as from others, make clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. See, e.g., id.; Garland [v. Polley], 594 F.2d [1220, 1223 (8th Cir. 1979)]; Hall v. Sutton, 755 F.2d 786, 787 (11th Cir. 1985); Matzker v. Herr, 748 F.2d 1142, 1150-51 (7th Cir. 1984) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper."); Lamar v. Steele, 693 F.2d 559, 562 (5th Cir. 1982), cert. denied, 464 U.S. 821, 104 S.Ct. 86, 78 L.Ed.2d 95

> (1983); Milhouse v. Carlson, 652 F.2d 371,374 (3d Cir. 1981); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976). An individual is entitled to "free and unhampered access to the courts." United States ex rel. Cleggett v. Pate, 229 F. Supp. 818, 821-22 (N.D.Ill.1964).

Harrison v. Springdale Water & Sewer Commission, supra at 1427-28.

By way of an example, in *Harrison*, the Court determined that the plaintiffs' Complaint stated a cognizable cause of action, based on a claimed denial of access to the Courts, when the Complaint alleged that, in a suit by the plaintiffs against State actors, the State actors admitted to prosecuting a factually unsupported counterclaim against the plaintiffs solely as a tactical means to pressure them into settling their case. *Id.* at 1428. Thus, while the plaintiffs' ability to file a lawsuit was not directly constrained, the Court found, nonetheless, that the defendants applied sufficient indirect pressure to restrict the plaintiffs' access to the Courts.

Similarly, in *Whisman*, the plaintiffs – who were the grandparents of a juvenile in the custody of the State of Missouri – alleged that the defendants – who were Missouri child welfare workers – intentionally failed to initiate Juvenile Court proceedings, even though the defendants knew that the plaintiffs desired to obtain custody of their grandchild. The Court found that the plaintiffs properly plead a claimed denial of access to the Courts because, under Missouri law, grandparents could not file an action to commence custody proceedings, but could only intervene in a custody proceeding which was initiated by the defendants. *Id.* at 1313. As well, in *In re Workers Compensation Refund*, supra, the Court found

that a Minnesota Statute, that required the plaintiffs to pay the full cost of an action regardless of who prevailed in the action, was "a substantial deterrent to commencing litigation," which denied the plaintiffs access to the Courts. *Id.* at 822.

Each of the decisions, in *Harrison*, *Whisman*, and *In re Workers Compensation Refund*, involved affirmative conduct by the defendants which indirectly chilled the plaintiffs' exercise of their right of access to the Courts. Here, in contrast, the Scheelers concede that they have no evidence that the Defendants intentionally engaged in any conduct that denied them meaningful access to the Courts. Indeed, they are unable to contend that they were denied direct access to the Courts, since their State Court wrongful death action, against Marshall and Wolf, proceeded to Trial, where the Jury found in favor of Marshall and Wolf. See, *Spitzmiller v. Hawkins*, 183 F.3d 912, 916 (8th Cir. 1999). Rather, the Scheelers' claims are based on the Defendants' asserted failure to adequately investigate Craig Scheeler's death. In their pre-Hearing Memorandum, the Scheelers failed to cite any authority for the proposition that a failure to act, rather than affirmative conduct, can give rise to a claim for the denial of access to the Courts, and we were unable to uncover any such authority upon our independent inquiry.

At the Hearing on the Motion, when questioned on the requisite level of scienter that would be required to support a denial of the right of access to the Courts, the Scheelers contended that intent was not required in order to maintain a Section 1983 action for the denial of access to the Courts. In a post-Hearing submission to the Court, which is dated February 19, 2004, the Scheelers cited five cases that, they assert, support the proposition that "a

showing of 'willful' or 'deliberate indifference' 'reckless disregard' or 'gross negligence' is sufficient to state a claim under §1983." *Docket No. 25.* The five cases cited by the Scheelers are: *Colburn v. Upper Darby Township,* 838 F.2d 663 (8th Cir. 1988); *Frey v. City of Herculaneum,* 44 F.3d 667 (8th Cir. 1995); *Stump v. Gates,* 211 F.3d 527 (10th Cir. 2000) (*"Stump II"*) and *Stump v. Gates,* 986 F.2d 1429, 1993 WL 33875 (10th Cir., February 11, 1993) (*"Stump I"*); *Putnam v. Keller,* 332 F.3d 541 (8th Cir. 2003); and *Feist v. Simonson,* 222 F.3d 455 (8th Cir. 2000). Only one of the five cases involved a denial of access to the Courts, or a failure to investigate. Further, not only do we find that the cited cases do not support the Scheelers' proposition, but we find that the cases actually undercut their assertion that a failure to investigate, standing alone, can give rise to a Section 1983 claimed denial of access to the Courts, without some showing that the Defendants deliberately acted to impede the Defendants' access to the Courts.

In *Colburn,* the family of a woman, who committed suicide while in the custody of the defendants at a jail, commenced a Section 1983 action against the township and its police department. The Third Circuit Court of Appeals recognized a Substantive Due Process right of a prisoner to be protected from injuring herself. In contrast to the facts of this case, the plaintiffs in *Colburn* neither alleged that the defendants failed to investigate, nor that the defendants denied them access to the Courts. See, *Colburn v. Upper Darby Township,* supra at 668. Thus, *Colburn* is readily distinguishable from the facts of this case.

Further, while the Court held that, "where prison officials infringed a liberty interest by intentional conduct, gross negligence, or reckless indifference * * * the matter

is actionable under section 1983,"[2] the Court based its holding on the rationale that, because "an inmate is not free to leave the confines which s/he is forced to share with other prisoners, the state bears the responsibility for an inmate's safety." *Id.* at 668. Obviously the same rationale does not apply to the facts of this case, as Craig Scheeler was not in the Defendants' custody at the time of his death, and therefore, the Defendants should not be held to some higher standard of care.

Frey also involved a jail suicide. In *Frey,* the plaintiffs alleged that the defendants were deliberately indifferent to the decedent's suicide "because they each knew or should have known that he routinely talked about suicide, that he put a gun in his mouth, that he had a severe drug and alcohol problem, and that he responded affirmatively when asked, at the time of his arrest, whether he was ill." *Frey v. City of Herculaneum,* supra at 672. As in *Colburn,* the case does not involve a failure to investigate, or the denial of access to the Courts. Thus, the applicability of this case to the Scheelers' claim is unclear. Unlike *Frey,* the Scheelers point to no evidence that the Defendants, knew or should have known, in investigating Craig Scheeler's death, that would have led investigators to different conclusions.

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[2] But see, *Windham v. City of Lowell,* 133 F.3d 924, 1998 WL 1348, at *1 (8th Cir. 1998) ("While other circuits have set forth various formulations of the minimum level of culpability required to sustain a claim under section 1983 for a denial of substantive due process, we have declined to do so," *Gregory v. City of Rogers,* 974 F.2d 1006, 1012 (8th Cir. 1992), as [w]e have held gross negligence does not implicate the due process clause."), citing *Myers v. Morris,* 810 F.2d 1437, 1468 (8th Cir.), cert. denied, 484 U.S. 828 (1987).

In *Stump,* the wife of a man, who was found shot in the head in his home, and the step-mother of the plaintiff trustees, called 911 to report that the decedent had shot himself. The authorities – who were the defendants in that case – concluded that the death was a suicide. In compliance with the wishes of the decedent's wife, his body was cremated, and the "weapons that were found in his home were melted down, prior to any ballistic tests having been performed. See, *Stump II,* supra at 537; *Stump I,* supra at *1. In *Stump I,* the United States Court of Appeals for the Tenth Circuit upheld the decision of the District Court, which denied the defendants' Motion to Dismiss for the failure to state a claim on grounds that they were entitled to qualified immunity. See, *Stump I,* supra at *1. The Court emphasized that the plaintiffs had alleged sufficient facts from which a Jury could conclude that the defendants "deliberately" destroyed evidence. *Id.*

In *Stump II,* the same Court of Appeals remanded the case to the District Court for a new Trial, after a Jury returned a Verdict in favor of the plaintiffs on their claim that the defendants denied them access to the Courts. See, *Stump II,* at 531. The Court reasoned that the District Court erroneously allowed into evidence portions of a Grand Jury transcript in which the Grand Jury found that one of the defendants – the chief of police – had impeded the investigation by tampering with and destroying evidence. *Id.* While the facts of the *Stump* cases are analogous to this case, as they did involve the denial of access to the Courts, here, the Scheelers do not allege that the Defendants destroyed evidence, or impeded the investigation in any other way. Rather, as we have noted, the Scheelers merely allege that the Defendants did not investigate to a conclusion that would assist their wrongful death claims.

Thus, *Stump I*, and *Stump II*, undermine the Scheelers' assertion that the failure to adequately investigate, standing alone, can give rise to a Section 1983 action for the denial of access to the Courts, as the defendants, in the *Stump* cases, were accused of affirmatively acting to impede the investigation, by deliberately destroying evidence, while the Scheelers simply, and generically allege, that the Defendants failed to adequately investigate.

We find the facts, in *Putnam*, inapposite to those presented here. There, the defendants – who *were* college officials at the Community College at which the plaintiff formerly taught – banned the plaintiff from the campus following allegations of inappropriate, and potentially unlawful, conduct. See, *Putnam v. Keller*, supra at 545. Our Court of Appeals recognized that the defendants denied the plaintiff his First Amendment right by banning him from the campus. *Id.* at 546. Thus, not only is *Putnam* distinguishable on the basis that it did not involve a claimed denial of access to the Courts, or the failure to adequately investigate an accident, the defendants, in *Putnam*, engaged in the affirmative act of banning the plaintiff from a college campus.

Lastly, in *Feist*, a police pursuit ended tragically when the vehicle driven by the fleeing suspect crashed into a car driven by one of the plaintiffs, thereby crippling the plaintiff, and killing his passenger. See, *Feist v. Putnam*, supra at 458-460. The plaintiffs brought a Substantive Due Process claim against the pursuing police officers, and their employers. In determining whether the defendants were entitled to qualified immunity, our Court of Appeals

applied the "deliberate indifference" standard, as opposed to the "intent to harm" standard. *Id.* at 463.[3]

Obviously, a police hot pursuit – involving conduct which is clearly affirmative and intentional – is so distinguishable from a case based on a claimed failure of the police to adequately investigate, that *Feist* has no bearing on the facts of this case. Of course, to hold otherwise – by asserting that a police pursuit is akin to the failure to investigate – would further undermine the Scheelers' argument that a failure to investigate can give rise to the denial of meaningful access to the Courts, as the holding, in *Feist*, has been expressly overruled. See, *Helseth v. Burch*, 258 F.3d 867, 868 (8th Cir. 2001) ("We overrule *Feist*"). The appropriate standard, which is now applied in this Circuit to police pursuit cases, is the "intent to harm" standard. See, *Slusarchuk v. Hoff*, 346 F.3d 1178, 1181-1182 (8th Cir. 2003) ("The intent-to-harm standard applies to appellees' claims based upon the officers' pursuit of [the fleeing suspect].").

Lest there be doubt to the contrary, we do not read *Helseth* or *Slusarchuk* to apply beyond the unique factual circumstances of police pursuit cases. However, while the Scheelers are not required to prove that the Defendants intentionally acted to harm" them, we find nothing in the authorities, which have been proffered by the Scheelers or by anyone else, that convinces us that a negligent, or even

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[3] But see, *Kent v. Todd County*, 2001 WL 228433, at *4 (D. Minn. 2001) (citing *Feist v. Simonson*. 222 F.3d 455, 459, n. 2 (8th Cir. 2000) for the proposition that "Section 1983 does not apply to negligent conduct of state officials."); see also *Feist v Simonson*, 36 F. Supp.2d 1136, 1150 (D. Minn. 1999) ("[Slection 1983 liability by officers does not result from 'negligent' behavior.").

grossly negligent, failure to adequately investigate may give rise to a claim for the denial of access to the Courts under Section 1983. See, e.g., *Wilson v. Lawrence County*, 260 F.3d 946, 955 (8th Cir. 2001) ("Negligent failure to investigate other leads or suspects does not violate due process," and "[e]ven allegations of gross negligence would not rise to the level of a constitutional violation."); *Hunter v. Namanny*, 219 F.3d 825, 833 (8th Cir. 2000) ("A showing of inadvertence, negligence, or even gross negligence in presenting or failing to present facts to the issuing judge does not carry the day for a section 1983 plaintiff."); *Wells v. Walker*, 852 F.2d 368, 371 (8th Cir. 1988) ("The Supreme Court, however, has held that negligent conduct by government officials cannot be the source of a 'deprivation' of constitutional rights for section 1983 purposes."), citing *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); see also, *Brown v. City of Bloomington*, 280 F. Supp.2d 889, 894 (D. Minn. 2003) ("Negligent conduct fails to establish a claim under section 1983."), citing *Young v. City of Little Rock*, 249 F.3d 730, 734 (8th Cir. 2001); *Estes v. Moore*, 993 F.2d 161, 163-64 (8th Cir. 1993); see also, *Brown v. Morgan*, 39 F.3d 1184, 1994 WL 610993, at *1 (8th Cir. 1994) ("[A] constitutional claim cannot be based on mere negligence.").

Rather, to establish a claim for the denial of access to the Courts, the Scheelers must demonstrate that the Defendants acted recklessly by deliberately interfering with their access to the Courts. See, *Wilson v. Lawrence County*, supra at 955; see also *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (inadequacy of police training may serve as basis for section 1983 municipal liability only where failure to train amounts to deliberate indifference); *Kampfer v. Vonderheide*, 216 F. Supp.2d 4, 7 (N.D.N.Y.

2002) ("To state a claim for a violation of the right to access the courts [the plaintiff] must allege facts which indicate that (1) the defendant 'deliberately and maliciously interfered' with this access, and that (2) this interference resulted in injury."), citing *Smith v. O'Connor,* 901 F. Supp. 644, 649 (S.D.N.Y. 1995).

In *Wilson*, the plaintiff, who pled guilty to murder in order to avoid the death penalty following the denial of his Motion to Suppress his confession, which he contended had been coerced, alleged that the defendants violated his Fourteenth Amendment Due Process rights by recklessly or intentionally failing to pursue other leads in the investigation of the murder for which the plaintiff pled guilty. See, *Wilson v. Lawrence County,* supra at 950. In considering what the appropriate "culpable state[ ] of mind" was for a Section 1983 Due Process claim, our Court of Appeals explained that, "in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done recklessly." *Id.* at 956, citing *Neal v. St. Louis County Board of Police Commissioners,* 217 F.3d 955, 958 (8th Cir. 2000). The Court then held that "officers conducting the post-arrest investigation certainly had the luxury of unhurried judgments and repeated reflections, which make a reckless standard appropriate." *Id.* at 957.

If the recklessness standard applies to criminal investigative efforts in the posture of constitutional claims brought by an accused, then a recklessness standard should also apply to the claims brought by the Scheelers here. *Id.* As the Court, in *Wilson* explained, "[l]aw enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly * * * ." and "[t]here is no countervailing

equally important governmental interest that would excuse the appellants from fulfilling their responsibility to investigate these leads." *Id.* at 957. While the Defendants owed a duty to the Scheelers, as members of the public, to investigate their sons death, they had no duty to investigate so as to advance the Scheelers' interest in pursuing a wrongful death action.[4] Thus, the Scheelers must show, at a minimum, that the Defendants recklessly failed to investigate Craig Scheeler's death.

The Record before us contains no more than the Scheelers' bare assertion that the Defendants did not thoroughly investigate their son's death. In their Complaint, the Scheelers do not even assert that any of the Defendants did anything affirmatively to destroy, hide, or otherwise conceal, any evidence that would help them prove their wrongful death claims against Marshall and Wolf. Moreover, the Record is devoid of any evidence that the Defendants deliberately disregarded aspects of the investigation that could have led to additional evidence against Wolf, Marshall, or other suspects in the death of Craig Scheeler.

In support of their Motion for Summary Judgment, the Defendants outline their investigation of Craig Scheeler's death. The Defendants maintain that they conducted a diligent and thorough investigation. The Defendants explain that, on the day that Craig Scheeler died, immediately after he was transported to the hospital, the police commenced their investigation of his shooting.

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[4] See, e.g., *Lawyer v. Kernodle*, 721 F.2d 632, 635 (8th Cir. 1983) (in determining cause of death, a coroner owes duty to the public, not to those who may stand accused of the decedent's death).

They further assert that both Wolf, and Marshall, were questioned, separately, while still at the scene. See, *Iverson Affidavit, Ex. 2.*

In addition, the materials submitted by the Defendants reveal that more than six law enforcement officers were involved in the preliminary investigation, including Officer Dave Missel, Officer Mark Moline, Sergeant Michael Gohman, Sergeant David LaBeaux, Investigator Lee Mayavski ("Mayavski"), and Evidence Technician Gary Leininger ("Leininger"). *Id., Exs. 3 & 6.* Leininger also conducted an investigation of the scene. *Id., Ex. 6.* A medical examination of Craig Scheeler's body was performed by Mayavaski [sic], who was acting in his capacity as a Deputy Medical Examiner, under the direction of Dr. David L. Fredrickson ("Fredrickson"), but no autopsy was performed. *Id., Ex. 9.* Several days after Craig Scheeler's death, on March 27, 1997, Mayavski contacted Wolf, and again questioned him on what had occurred on the day Craig Scheeler died. *Id., Ex. 8.* Both Wolf and Marshall were questioned on numerous occasions over the next several years. See, *id., Ex. 16.* Eventually, even the Chief of Police participated in the investigation, as well as several outside agencies. *Id.*

Wolf and Marshall told the investigators that they had observed Craig Scheeler place one live round in the gun, spin the cylinder of the gun, place the gun to his head, and then pull the trigger. They also reported that they had observed Craig Scheeler perform the same maneuver on numerous other occasions, but noted that, on those prior occasions, Craig Scheeler usually looked at the gun to make sure there was not a bullet in the chamber. Wolf and Marshall described for investigators where Craig was when he pulled the trigger, and the placement of the gun

to his head. The investigating officers determined that Wolf's story was consistent with Marshall's version of the events. The investigators also determined that their examination of the scene, as well as of Craig Scheeler's body, were also consistent with the version of events that had been provided by both Wolf and Marshall. On this Record, there is nothing to suggest that the Defendants conducted the investigation of Craig Scheeler's death recklessly, or that they deliberately disregarded any evidence.

Upon further investigation, the Defendants learned that at least five individuals had personally observed Craig Scheeler fool with loaded guns in the same manner as he had on the day on which he died. In addition to Wolf and Marshall, the Defendants also interviewed Brian Lutz ("Lutz"), Timothy Jay Bruner ("Bruner"), and Bernard Mathew Heinen, all of whom reported to the investigators that they had observed Craig Scheeler place a loaded gun to his head, and pull the trigger, on prior occasions. *Id.*, *Exs. 13, 16, & 24*. Those statements further corroborated the Defendants' initial investigation.

Moreover, the Record demonstrates that the Defendants were not indifferent to additional evidence that was, brought to their attention by the Scheelers. Instead, the Record reveals that the Defendants actively pursued every lead that was drawn to their attention by the Scheelers. For example, on June 6, 1997, the Scheelers first expressed their dissatisfaction with the investigation of Craig Scheeler's death to Mayavski. *Id.*, *Ex. 11*. In response to the Scheelers' concerns, Mayavski questioned Marshall a second time. *Id.*

On January 6, 1998, the Scheelers reported to the St. Cloud Police Department that they had heard that Craig Scheeler was the target of a "gang hit." *Id., Ex. 12.* It was determined that the source of the rumor was Joseph Lee Luebesmier ("Luebesmier"). The Defendants made an effort to locate Luebesmier, which included contacting Marshall and Wolf, again. See, *id.*

On or about January 15, 1998, the Scheelers wrote to Captain David L. Johnson ("Johnson"), who is employed by the St. Cloud Police Department, expressing their concern over the blood spatters at the scene, and the position of Craig Scheeler's body. *Id., Ex. 14.* The Scheelers contended that the blood spatter was inconsistent with the Defendants' determination as to where Craig Scheeler was when the gun was discharged. Johnson forwarded the Scheelers' letter, as well as photographs of the scene, to Tom Bevel ("Bevel"), of TBI, which is a "[a] forensic education & consulting company." *Id.* Bevel reviewed the photographs of the scene, and discredited all of the Scheelers' contentions. *Id.*

On or about August 27, 1998, the Scheelers sent a letter to the St. Cloud Police Department, which reported that Craig Scheeler's cash card was missing from his wallet, and that there had been activity, on his cash card, on March 26, 1997, even though Craig Scheeler had died on March 24, 1997. *Id., Ex. 12.* The Defendants made calls to the bank, and discovered that the card was last used on March 24, 1997. The bank was unable to provide any further information concerning the nature of the transaction that had occurred on that date. *Id.*

On or about November 16, 1998, the Scheelers contacted Johnson to express their concern over the position

of the gun when it was fired. *Id., Ex. 16.* In response to the Scheelers' concern, the St. Cloud Police Department consulted with outside investigators at the Federal Bureau of Investigation ("FBI"), *id., Ex. 15*, the St. Paul office of the Bureau of Alcohol, Tobacco, and Firearms, *id., Ex. 16*, and with Bevel at TBI. *Id.* The FBI opined that the gun was held in an inverted position when it was fired, which was consistent with the Defendants' conclusions. *Id.*

Even after the Scheelers commenced the State Court wrongful death action against Wolf and Marshall, the Defendants continued to investigate Craig Scheeler's death, and interviewed a number of individuals who the Defendants believed could have had information related to the manner in which Craig Scheeler died. *Id., Ex. 16.* The State Court action was commenced in or about March of 2000, and the Scheelers' attorney requested information from the St. Cloud Police Department starting in approximately May of 2000. *Id.* The St. Cloud Police Department complied with the requests made by the Scheelers' attorney, and continued interviewing individuals who might have germane information. In June of 2000, the investigators interviewed Bruner, Lutz, and Wolf. *Id.*

Based on this Record, there is nothing to substantiate the Scheelers' surmise that the Defendants' recklessly conducted the investigation into their son's death, or that the Defendants were deliberately indifferent to any evidence uncovered in the course of their investigation which may have led them to different conclusions. Thus, we find that the Defendants properly seek Summary Judgment, and therefore, the burden shifts to the Scheelers to demonstrate the existence of a genuine dispute as to the Defendants' investigation into Craig Scheeler's death. As stated, the Scheelers, at a minimum, must demonstrate, by

affidavit or otherwise, that the Defendants' investigation was conducted in a reckless manner.

In their Memorandum in response to the Defendants' Motion, the Scheelers contend that the Defendants failed to perform the following investigative tasks: 1) test the hands of Craig Scheeler, Marshall, and Wolf, for gunshot residue; 2) test the palm of Craig Scheeler's right hand for blood spatter; 3) fingerprint the scene; 4) test the blood on the couch; 5) test the t-shirt worn by Craig Scheeler; 6) test the gun and the bullets recovered at the scene; 7) provide Bevel with all of the relevant photographs of the scene and of Craig Scheeler's body; 8) properly interview Marshall and Wolf; 9) investigate obvious inconsistencies in the statements of Wolf and Marshall; 10) secure the scene to prevent the destruction of evidence; 11) follow-up on tips from third parties; 12) properly count the bullets found at the scene; 13) account for missing guns that were identified by Marshall; 14) perform an autopsy on Craig Scheeler; and 15) have the Medical Examiner personally examine Craig Scheeler's body. The Scheelers also assert that the Defendants wrongly adopted the opinion of Dr. Michael McGee, who serves as the Ramsey County Medical Examiner.

The Defendants have provided us with a Record of what they did to investigate Craig Scheeler's death, and now the Scheelers have provided us with a list of what they assert the Defendants failed to do. What is missing from this Record, however, is any evidence demonstrating that the Defendants failed to perform any aspect of the investigation based on a deliberate indifference. As stated, a negligent failure to investigate does not give rise to a Section 1983 claim for the denial of access to the Courts. Rather, the Scheelers must present some evidence from

which a fact finder could conclude that the Defendants acted with deliberate indifference to the Scheelers' right of access to the Courts.

In response to the Defendants' Motion, the Scheelers have provided the Court with the findings and conclusions of the Office of Crime Victims Ombudsman for the State of Minnesota ("Ombudsman Report"). See, *Plaintiffs' Exhibits. Ex. A.* After reviewing the case, the Ombudsman Report concluded that "[t]he St. Cloud Police Department mistreated the Complainants [the Scheelers] by failing to thoroughly investigate the death of the Victim [Craig Scheeler]." *Id.* at 6. The Ombudsman Report reasoned that the Defendants "hastily determined the scene to be an accidental shooting [which] hampered their ability to exam [sic] the death as a potential crime scene." *Id.*, at 5. However, the focus of the inquiry made in the Ombudsman Report is different from that which controls our inquiry.

While, under Minnesota Statutes, the Ombudsman Report is part of a program to "strengthen procedures and practices which lessen the risk that objectionable administrative acts will occur" within the criminal justice system, *Minnesota Statutes. Section 611A.74, Subdivision 2*, our analysis is confined to determining whether a genuine issue of material fact exists as to each element of the Scheelers' Section 1983 claim, and specifically, whether the Defendants acted with a reckless disregard in their investigation of Craig Scheeler's death so as to deprive the Scheelers of their day in Court. The focus of the Ombudsman Report was to ascertain whether "the St. Cloud Police Department mistreat[ed] the Complainants [the Scheelers] by failing to pursue a complete and thorough investigation pursuant to 'best practices' into the death of the Victim," and whether the St. Cloud Police Department

violated its own internal policies and procedures. *Id.* at 3-4. Neither inquiry addresses whether the Defendants' investigation rose to the level of recklessness that is required in order to prove a Section 1983 claim for the denial of access to the Courts. To survive a Motion for Summary Judgment, the Scheelers must show more than that the Defendants neglected to conduct the best investigation, or even that reasonable and prudent investigators would have conducted the investigation differently. Instead, the Scheelers must show that the Defendants were so reckless in their investigation so as to have deprived the Scheelers of a meaningful access to the Courts. While the Ombudsman Report, and the Scheelers, take strong exception to certain of the practices that were employed by the Defendants, neither so much as intimates that those practices were deliberately implemented to deny the Scheelers their day in Court.

For example, the Ombudsman Report speaks of the "possibility" that, when the Defendants released the scene of the shooting on the very next day, evidence was lost. *Id.* at 3. The Report does not identify any evidence that actually was lost. Moreover, the Record reveals that the scene was examined by Leininger, who is a trained Evidence Technician, shortly after Craig Scheeler was taken to the hospital. Thus, the Record reveals that the Defendants made an effort to obtain all of the evidence from the scene, and the Scheelers offer nothing to suggest that the Defendants deliberately disregarded any evidence at the scene, or that their decision to release the scene was made recklessly in order to impair the Scheelers' potential wrongful death action.

The Report also opines that the investigators' method of interrogating Wolf and Marshall was not optimal.

According to the Report, Marshall and Wolf should have been interviewed at the police station, rather than in a patrol car, and it suggests that they should have been subjected to a more intense form of interrogation. However, the Report does not mention any of the countervailing interests, which are imposed upon law enforcement officers when questioning individuals, such as the individuals' Fourth, Fifth and Sixth Amendment rights. Similarly, the Report is critical of the Defendants for failing to treat Wolf and Marshall as crime suspects, rather than as mere witnesses, but neither the Report, nor any other evidence in the Record presented, demonstrates that the Defendants had any reason to believe that either Wolf, or Marshall, were anything more than witnesses to an accidental shooting.

Further, the Scheelers contend that the Defendants failed to conduct an autopsy on Craig Scheeler's body. However, the failure to conduct an autopsy, like the failure to conduct any other aspect of the investigation, is not evidence that the Defendants deliberately did anything which indirectly, or directly, denied the Scheelers' access to the Courts. Under Minnesota law, "it is within the medical examiner's discretion whether to conduct an autopsy, [as] the medical examiner should be viewed as an independent party." *State v. Lopez-Solis*, 589 N.W.2d 290, 294 (Minn. 1999), citing *Minnesota Statutes Section 390.32* (1996). Section 390.32 provides that "[t]he medical examiner may conduct an autopsy in the case of any human death * * * when in the judgment of the medical examiner the public interest requires an autopsy." *Roepke v. Rice County 66 Oil*, 260 N.W.2d 464, 456 n. 1 (Minn. 1977). Thus, the Defendants failure to conduct an autopsy does not even demonstrate a breach of a duty to anyone, much less that

the Defendants acted deliberately to conceal evidence, or to otherwise deny the Scheelers' access to the Courts.[5] The same can be said of each of the other asserted shortcomings of the Defendants' investigation, whether considered individually, or in combination. While the investigation may not have been textbook in its quality, derelictions in crime investigations, detailed five years after the fact, can come easily but, here, there is no evidence that the derelictions were either deliberate, or were directed at denying the Scheelers an opportunity to vindicate their rights in Court.[6]

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[5] Regardless, autopsy reports are given little deference in subsequent civil litigation, See, *Demgen v. Fairview Hosp.*, 621 N.W.2d 259, 267 (Minn.App. 2001). As the Court, in *Demgen*, explained:

> Autopsy reports are: not documents which the law requires to be prepared anticipating contested litigation, not always a thorough medical explanation for what happened, are drawn ex parte, at times consist of only two or three lines in a voluminous hospital/medical report, and often, after further discovery, and/or trial testimony, cannot be relied upon exclusively as a cause of death. Neither plaintiffs nor defendants in medical malpractice suits give a two- or three-line autopsy report that degree of credibility. The district court simply erred by relying on the autopsy and placental pathology reports to act as rebuttal affidavits to [the expert], and, to then conclude the affidavits were not sufficiently rebutted.

Id.

[6] We seriously doubt that the Courts could sustain the burden if claimed inadequacies, in police investigations, would properly serve as the predicate for claimed denials of access to the Courts. Police officers would be required to exhaust all investigative techniques, inclusive of photographs, sketches, measurements, and the like, no matter how serious the automobile accident, to use but one example, for fear that, sometime later, a person injured in, or damaged by the accident, would commence civil litigation, and claim that sufficient evidence was not

(Continued on following page)

In truth, the difficulties in the Plaintiffs' proof is directly attributable to the fact that the Defendants had no means of knowing whether the Scheelers were intending to sue Wolf and Marshall, or anyone else. The investigative efforts of the officers were solely directed toward determining whether a crime had been committed and, if so, by whom, and were not concerned with who might bear civil liability to the Scheelers for the death of their son. The Record presented is bereft of any evidence which so much as intimates that any of the Defendants had an interest in frustrating, let alone impairing, the Scheelers' access to the Courts. Rule 56(e), Federal Rules of Civil Procedure, states that a party may not rest upon mere allegations in its pleadings to survive a properly supported Motion for Summary Judgment, but states that a party must set forth specific facts that show the existence of a genuine issue of material fact for Trial.

We have reviewed the entirety of the Record, including all of the submissions made by the Scheelers, and we conclude that the Scheelers have failed to set forth any evidence which could support a finding that the Defendants acted recklessly so as to deny them access to the Courts. It is not sufficient that the Scheelers present evidence which criticizes, or second-guesses, the investigative efforts of the Defendants, or which questions the conclusions reached. Absent from this Record is any evidence which so much as intimates that any of the Defendants harbored personal interests or gains, impermissible conflicts of interest, or other ulterior motives, which prompted them to skew their investigation, or

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preserved by the police as to allow a Verdict favorable to the complainant. The sheer expense of such a duty counsels against its adoption.

shortcut its scope, so as to deny the Scheelers of a legitimate wrongful death action. Therefore, we grant the Defendants' Motion for Summary Judgment with respect to Scheelers' claim that the Defendants' denied them access to the Courts.

b. *The Federal Conspiracy Claim.* The Scheelers assert that the Defendants conspired to conceal the true cause of Craig Scheeler's death, in violation of Section 1983. In order to maintain a conspiracy claim under Section 1983, the Plaintiff's must demonstrate that the Defendants' conduct violated a right secured by the Constitution. See, *Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *DuBose v. Kelly*, 187 F.3d 999, 1002 (8th Cir. 1999); *Jones v. Gutschenritter*, 909 F.2d 1208, 1211 (8th Cir. 1990). In the absence of an underlying constitutional violation, a Section 1983 conspiracy claim cannot be sustained. *Slusarchuk v. Hoff*, supra at 1183 ("Absent a constitutional violation, 'there is no actionable conspiracy claim.'"), quoting *Cook v. Tadros*, 312 F.3d 386, 388-89 (8th Cir. 2002); *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999).

Here, the underlying constitutional violation is the denial of the Plaintiffs' right of access to the Courts. Having found that the Scheelers' right to access was not violated by the Defendants' purportedly inadequate investigation, there is no constitutional violation on which to base a conspiracy claim. Accordingly, we also grant the Defendants' Motion for Summary Judgment with respect to the Scheeler's Section 1983 conspiracy claim.

c. *The State Law Conspiracy Claim.* The Scheelers also maintain that the Defendants conspired to conceal the true cause of Craig Scheeler's death in violation of the

laws of the State of Minnesota. Under Title 28 U.S.C. § 1367(c), when a Federal District Court has dismissed all claims over which it has original jurisdiction, the Court may decline to exercise its supplemental jurisdiction over any State law claims, See, *American Civil Liberties Union v. City of Florissant*, 186 F.3d 1095, 1098-99 (8th Cir. 1999) ("[W]hen state and federal claims are joined and all federal claims are dismissed * * * the state claims are ordinarily dismissed without prejudice to avoid needless decisions of state law * * * as a matter of comity.").

Here, the Scheelers' State Court action against Wolf and Marshall is currently on appeal to the Minnesota Court of Appeals. We view, however, the legal issues raised in the State Court action as separate and distinct from those presented here, and given the close intertwining of the Scheelers' Section 1983 action, and their claim of a civil conspiracy, we decline to dismiss the civil conspiracy claim without prejudice, as the claim could be renewed in State Court, with the prospect that another Court will have to address some of the same issues we have explored here. Accordingly, we proceed to a consideration of whether a viable claim of civil conspiracy has been raised here.

Under Minnesota law, a civil conspiracy cannot stand alone, for it must be based upon a criminal act or an intentional tort. See, *Senart v. Mobay Chemical Corp.*, 597 F. Supp. 502, 505 (D. Minn. 1984) ("Civil conspiracy * * * had to be based on a criminal act or an intentional tort."), citing *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981), citing in turn, Prosser, *Handbook on the Law of Torts* §46; *SICK, Inc. v. Motion Control Corp.*, 2003 WL 21448864 at *10 (D. Minn. 2003), quoting *Harding v. Ohio Casualty Ins. Co. of Hamilton*, 230 Minn. 327, 339, 41 N.W.2d 818, 825 (Minn. 1950) ("Since the allegations as

to conspiracy do not change the nature of the cause of action constituting the gist of plaintiff's alleged cause of action, there can be no recovery unless substantive wrongs are pleaded.").

Here, the Scheelers have not pled, let alone proved, an underlying intentional tort, or criminal act, by any of the Defendants. Nor have we found any other actionable wrong that could serve as the predicate for a civil conspiracy claim. See *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn.App. 1997) ("[T]he conspiracy count fails because it is not supported by an underlying tort."). Accordingly, we grant the Defendants' Motion for Summary Judgment as to State law conspiracy claim as there is no basis in the Record presented to sustain any such cause of action. See, *Evans v. T.W. Services, Inc. of Delaware*, 930 F.2d 612, 616 (8th Cir. 1991).

B. The Defendants' Motion for Summary Judgment on the Grounds that the Individual Defendants are Entitled to Qualified Immunity.

"'Under the doctrine of qualified immunity, state actors are protected from civil liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,"'" *Lawyer v. City of Council Bluffs*, 361 F.3d 1099, 1102 (8th Cir. 2004), quoting *Sexton v. Martin*, 210 F.3d 905, 909 (8th Cir. 2000), quoting, in turn, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "To survive summary judgment based on the affirmative defense of qualified immunity, a claimant must '(1) assert a violation of a constitutional right; (2) demonstrate that the alleged right is clearly established; and (3) raise a genuine issue of fact as to whether the official would have known that his

alleged conduct would have violated plaintiff's clearly established right.'" *Gatlin ex rel. Gatlin v. Green*, 362 F.3d 1089, 1093 (8th Cir. 2004), quoting *Omni Behavioral Health v. Miller*, 285 F.3d 646, 651, quoting, in turn, *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996); see also *Lawyer v. Kernodle*, 721 F.2d 632, 635 (8th Cir. 1983). For a right to be considered clearly established, the "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In *Lawyer v. Kernodle*, the plaintiff alleged that the defendant, who performed an autopsy on the plaintiff's wife, negligently diagnosed the cause of his wife's death. The plaintiff was eventually charged with second degree murder in his wife's death, but the charges were later dropped. Our Court of Appeals found that the coroner, in performing an autopsy, was exercising his professional judgment and discretion. See, *Lawyer v. Kernodle*, supra at 635. The Court then noted that "[i]t has generally been held that coroners enjoy a qualified immunity when performing their official functions for the state." *Id.* The Court further noted that "'[p]rosecutors and their assistants also enjoy immunity from Section 1983 actions so long as the actions complained of appear to be within the scope of their prosecutorial duties,'" and that "'[t]his immunity is equally available to investigators for the state prosecutors for actions in connection with a criminal prosecution.'" *Id.*, quoting *Keating v. Martin*, 638 F.2d 1121 (8th Cir. 1980).

The rationale of *Lawyer v. Kernodle* applies with equal force to the Defendants in this action, all of whom were investigating the death of Craig Scheeler in their official

capacities. The Scheelers do not set forth any evidence that any of the Defendants engaged in activity that was not within their official capacities, although the Scheelers did name all of the individual Defendants in both their official and individual capacities. Moreover, the Scheelers' claims are not based on acts of the Defendants, but rather, on the Defendants' omissions and failures to act. Thus, the Scheelers do not allege that the Defendants engaged in activity that was outside the scope of their duties, but instead, the Scheelers assert that the Defendants did not adequately perform their official duties.

While the Scheelers' allege that their right of access to the Courts was denied, which is a clearly established constitutional right, the Scheelers have failed to set forth any evidence which demonstrates that the Defendants knew that their alleged conduct – the failure to adequately perform those aspects of the investigation that the Scheelers assert the Defendants should have performed – would violate the Scheelers' right to bring a wrongful death action against Wolf and Marshall. Clearly, on the Record presented, the Defendants are entitled to qualified immunity.

C. The Defendant's Motion to Dismiss on the Grounds that the Claims are Procedurally Barred.

The Defendants assert that the Scheelers' claims are procedurally barred by: 1) the *Rooker Feldman* doctrine;[7]

[7] See, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); see also, *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1065 (8th Cir. 1997).

2) collateral estoppel;[8] 3) res judicata;[9] 4) *Heck v. Humphrey*, 512 U.S. 477 (1994);[10] and 5) the statute of limitations. In addition, the Defendants assert that the County of Stearns, and the City of St. Cloud, are not "persons" within the meaning of Section 1983, and therefore, are not proper defendants in a Section 1983 action. Having granted the Defendants' Motion for Summary Judgment on the basis of their substantive challenge to the Scheelers' claims, it is unnecessary for us to address the Defendants' remaining procedural challenges in any detail. Nonetheless, in the interest of completeness, we briefly address the Defendants' procedural arguments.

The Defendants first contend that the Scheelers are attempting to relitigate, or collaterally attack, the Verdict in their State Court action against Wolf and Marshall. Based upon the State Court action, the Defendants contend that this action is barred by the *Rooker Feldman* doctrine, collateral estoppel, res judicata, and *Heck v. Humphrey*, supra. However, we do not construe the

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[8] Collateral estoppel applies to bar the relitigation of "an issue of fact or law, actually litigated and resolved by a valid final judgment, [which] binds the parties in a subsequent action, whether on the same or a different claim." *Leonard v. Southwestern Bell Corp. Dis-ability Income Plan*, 341 F.3d 696, 701 (8th Cir. 2003), citing *Thomas v. General Motors Corp.*, 522 U.S. 222, 233 n. 5 (1998).

[9] "Under res judicata, a judgment on the merits in an earlier lawsuit bars a second suit involving the same parties based on the same cause of action." *Professional Management Associates, Inc. v. KPMG LLP*, 345 F.3d 1030, 1032 (8th Cir. 2003), citing *Landscape Props., Inc. v. Whisenhunt*, 127 F.3d 678, 682 (8th Cir. 1997).

[10] In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that a claim for damages arising out of a State Court conviction or sentence that has not been invalidated is not cognizable under Section 1983.

Scheelers' claims as an attempt to relitigate, or challenge, the outcome of the State Court proceedings. The Scheelers do not contend that the State Court decision was incorrect, but rather, in this action, the Scheelers assert that the Jury Verdict would have been different had they been able to present sufficient evidence to the Jury that would have enabled the Jury to return a Verdict in their favor. The Scheelers further argue that, but for the Defendants' failure to adequately investigate their son's death, they would have had sufficient evidence to persuade the Jury that Marshall and Wolf were involved in Craig Scheeler's death. Thus, we find that the claims asserted in this action are different from the claims asserted in the State Court action.

Further, although the Scheelers contest the ultimate factual conclusion made by the Jury – that Craig Scheeler died of a self-inflicted gunshot wound – the Scheelers do not contest the process by which that Verdict was rendered. Moreover, in this action, the Scheelers had to prove that the Defendants denied them access to the Courts, by deliberately failing to investigate their son's death, in order to deny them access to the Courts. To prove the claims asserted in this action, the Scheelers need not prove, or disprove, that Craig Scheeler shot himself, but instead, they need only prove that the Defendants deliberately denied them access to the Courts. Accordingly, because the legal and factual inquiries are different from those claims asserted in the State Court action, we find that the Scheelers' new claims are not barred by the *Rooker Feldman* doctrine, collateral estoppel, res judicata, or *Heck. v. Humphrey*, supra.

The Defendants argue that a three-year statute of limitations should apply to the Scheelers' wrongful death

claims. However, the Defendants mischaracterize the Scheelers' present action as a wrongful death claim. In truth, the Scheelers' claim is based on the Defendants' alleged failure to adequately investigate their son's death – conduct which clearly occurred after that death. The Scheelers bring their claims solely under Section 1983. As our Court of Appeals, in *Egerdahl v. Hibbing Community College*, 72 F.3d 615, 618 n. 3 (8th Cir. 1995), has expressed, "[i]n Minnesota, §1983 claims are governed by the six-year limitations period of Minnesota's personal-injury statute."), citing *Minnesota Statutes Section 541.05, Subdivision 1(5)*; *Berg v. Groschen*, 437 N.W.2d 75, 77 (Minn. App. 1989). Thus, the six-year statute of limitations applies to the Scheelers' claims and, accordingly, we find that the Scheelers' claims are timely.

We agree, however, with the Defendants that the County of Stearns, and the City of St. Cloud, as political subdivisions of the State of Minnesota, are not "persons" within the meaning of Section 1983. See, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999); *Murphy v. State of Ark.*, 127 F.3d 750, 754 (8th Cir. 1997); *State of Mo. ex rel. Missouri Highway and Transp. Com'n v. Cuffley*, 112 F.3d 1332, 1335 n.3 (8th Cir. 1997). Therefore, we find that the Defendants County of Stearns, and the City of St. Cloud, are not proper defendants in this action, and the claims against them are dismissed with prejudice.

NOW, THEREFORE, It is –

ORDERED:

That the Defendants' Motion for Summary Judgment [Docket No. 23] is GRANTED.

BY THE COURT:

/s/ Raymond L. Erickson
Raymond L. Erickson
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2800

Delroy C. Scheeler, etc., et al.,	*	
	*	
Appellants,	*	
	*	
v.	*	Order Denying Petition
	*	for Rehearing and for
City of St. Cloud, et al.,	*	Rehearing En Banc
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

May 10, 2005

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

[LOGO] STATE OF MINNESOTA [SEAL]
OFFICE OF CRIME VICTIMS OMBUDSMAN
1021 Bandana Boulevard East, Suite 225
St. Paul, MN 55108
[Phone Numbers Omitted In Printing]

July 17, 2002

Rhonda and Delroy Scheeler
2618 Cooper Avenue South
St. Cloud, MN 56303

Dear Mr. and Mrs. Scheeler:

First, I want to apologize for the lengthy delays in this case. Our Office has completed its investigation of the complaints involving the St. Cloud Police Department. The Ombudsman has found the complaint justified. Enclosed please find a copy of the Ombudsman's Findings and the response submitted by the St. Cloud Police Department. The Ombudsman's conclusions are defined as follows:

- Exonerated: The reported act did not occur, the subject of the complaint was not involved, and/or the act(s) occurred, but were justified, lawful, and proper.
- Not Substantiated: There was insufficient evidence to prove or disprove that the act(s) occurred.
- Partly Justified: Some parts of the allegation were true.
- Justified: The act(s), did occur.

The St. Cloud Police Department has complied with the Ombudsman's recommendations. Thank you for your patience and cooperation with this investigation. If you

have questions regarding the enclosed, please feel free to contact me at 1-800-247-0390.

Sincerely,

/s/ Camille Molloy
Camille Molloy
Investigator

Enclosures

An Equal Opportunity Employer

State of Minnesota
Office of the Crime Victim Ombudsman
In Re the Complaint of:

Rhonda Scheeler and Delroy Scheeler
(On Behalf of Craig Scheeler)
Amended 7-12-02

OCVO File No.: 2001-0117

The Office of the Crime Victim Ombudsman (OCVO) received a complaint from the above-named individuals, (hereinafter Complainants), regarding allegations that the St. Cloud Police Department failed to conduct a thorough investigation into the death of their son, Craig Scheeler (hereinafter Victim).

COMPLAINANT'S STATEMENT OF THE FACTS

Complainants do not agree with the rulings of the Sterns County Medical Examiner and the St. Cloud Police Department that the Victim's death was the result of an accidental, self-inflicted gunshot wound. The Victim died of a gunshot wound to the head. There were two witnesses present at the time of death. The witnesses contend the Victim was playing Russian Roulette when the gun accidentally discharged resulting in the death of the Victim. Complainants allege the Victim was murdered.

The Victim had acted as an informant for the St. Cloud Police Department, which had resulted in the arrest and incarceration of an individual. The Complainants believe this person may have been instrumental in the death of the Victim, because it was believed that he had been

released from prison prior to the death of the Victim. However, investigations revealed that on the date of the Victim's death this individual was incarcerated at St. Cloud Correctional Facility. They further allege that because the St. Cloud Police Department came to an immediate conclusion that the Victim's death was accidental, his death was never fully investigated.

Complainants contend that as a result of the erroneous conclusion, police officers, investigators and evidence technicians failed to treat the Victim's death as a possible crime scene. Therefore, neglecting to gather and/or document possible evidence. The Complainants allege that the St. Cloud Police Department failed to thoroughly investigate the death of their son, which may have resulted in a conclusion other than accidental death.

STATEMENT OF ISSUE

Whether the St. Cloud Police Department mistreated the Complainants by failing to pursue a complete and thorough investigation into the death of the Victim.

FINDINGS

Pursuant to Minn. Stat. § 611A.74, Subd. 2, the OCVO may investigate complaints concerning possible violations of the rights of crime victims or witnesses and/or mistreatment by elements of the criminal justice system, including law enforcement and city or county attorneys.

On March 24, 1997, officers, detectives, and supervisors of the St. Cloud Police Department were dispatched to the Victim's residence. The first police officers to arrive at the residence found the Victim lying on the living room floor,

bleeding profusely from what appeared to be a head wound. According to police reports, the Victim was attempting to breathe and had a strong pulse. The officers attempted to staunch the flow of blood and provided the Victim oxygen. One of the officers located a pistol on the couch and moved it to the kitchen counter.

Two witnesses, whom were present at the time of the shooting, told the officers that the Victim had shot himself while playing Russian Roulette. The uniformed officers, the investigator, and the police supervisor each accepted those statements as true and failed to investigate the incident any further. As a result, the death scene was never examined as a potential crime scene.

A. Did the St. Cloud Police Department mistreat the Complainant by failing to pursue a complete and thorough investigation pursuant to "best practices" into the death of the Victim?

Although the St. Cloud Police Department believed this incident to be the scene of an accidental shooting, police training and department policy should have alerted them to the possibility that the shooting may not have been accidental. The residence in which the shooting occurred was released to the Victim's fiancée on the day following the incident. The residence was then thoroughly cleaned. This eliminated any opportunity for investigators to return and discover evidence, re-examine the scene, obtain measurements, or diagram the scene. As a result, it is possible evidence was irretrievable, contaminated, or lost. In either event, if the Victim's death were something other than a self-inflicted gunshot wound little if any evidence would be available to obtain a conviction.

An individual present at a death scene can be a fact witness, suspect, or neither.[1] Law enforcement professionals rely on police manuals and criminal justice tests[2] for the "best practices" for interviewing witnesses and/or suspects. Generally, when officers conduct interviews of suspects, witnesses, or persons with knowledge of the incident, they rely heavily on their senses. Senses such as sight to determine body language, hearing to determine hesitations, stutters and other impairment to aid in the determining if an individual is attempting to be deceptive.[3]

No police manuals outlining "best practices" would recommend the method of interviewing utilized in questioning the witnesses in this case. For example, the police supervisor questioned the witnesses in his squad car rather than at the police department. In addition, one of the witnesses was interviewed three days after the incident, over the telephone. Conducting interviews after a lapse in time, by telephone instead of face to face and in a vehicle where eye contact is more difficult fails to meet the standards prescribed above.

In this case there is no indication that the individuals who were present were considered to be anything other than witnesses. Because the apparent misconceptions and assumptions made by the professionals at the scene, this investigation was never considered to be the sight of a potential crime scene but rather it was thought to be an accidental death scene investigation.

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[1] Iban, F, Reid, J.E., & Buckley, J. (1986), Criminal Interrogation and Confessions, Third Edition, Los Angeles: Williams and Wilkens.

[2] Ibid.

[3] Ibid.

B. Did the St. Cloud Police Department mistreat the Complainants by violating its own policies and procedures?

The Chief of Police determines policies and procedures for the department. These policies are recorded in a policy manual and are distributed to each officer. Each officer of the police department has a responsibility to know and follow the directives of the policy manual. The St. Cloud Police Department Manual notes that "interviews of victims, witnesses and complainants will whenever possible be conducted in the field."[4] The St. Cloud Police Manual further dictates that a crime scene log "shall be maintained."[5] The crime scene log tracks those who enter the crime scene, appearance of the crime scene as well as reason for appearance. The manual provides a specific form for this use. However, no such log was maintained in this investigation.

It appears that the St. Cloud Police Department violated its own policy. Once again, it is believed that this occurred because officers at the scene neglected to view the scene as a potential crime scene. St. Cloud Police Department's failure to follow departmental policies and procedures fueled the Complainant's suspicion that their son's death was not accidental. This failure further allowed for investigators and others to easily make assumptions and conclusions regarding the untimely death of the Victim. As a result, the facts behind the Victim's death may never be known.

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[4] St. Cloud Police Department Manual, page 12.

[5] St. Cloud Police Department Manual, page 15.

Several years after the Victim's death, at the Complainants urging, the St. Cloud Police Department interviewed several friends of the Victim. The interviews proved only that the Victim periodically played Russian Roulette and liked to show off his guns. No further evidence was discovered to substantiate that the death of the Victim was anything other than accidental.

In an article in the St. Cloud Times newspaper which outlined police procedure for a situation such as this, it stated:

> . . . the police treat each suicide as a suspicious death when it comes to crime scene processing and assigning investigatory resources. That means preserving the scene and restricting access. It means treating the body as evidence that cannot be contaminated. It means getting a search warrant.[6]

In this same article the St. Cloud Police Chief is quoted as saying, "The body is evidence in these types of investigations." Unfortunately, none of these actions occurred in this incident. In fact an autopsy was never performed. If this is normal procedure, why then, was the death scene in this case treated differently?

C. Conclusion

The result of the erroneous assumptions, conclusions, and mistakes is that, even though the Victim's death might have been accidental, the Complainants, and others will never have closure because the manner in which the

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[6] St. Cloud Times, April 25, 1998 page 6A.

Victim died has never been proven beyond a reasonable doubt. The Ombudsman believes that the death scene and investigation should have been treated as a potential crime scene. As such, each witness should have been considered a suspect until sufficiently ruled out. At the very least, the investigators should have followed formal crime scene investigative procedures in this case.

The fact that investigators hastily determined the scene to be an accidental shooting hampered their ability to exam the death as a potential crime scene. As a result of these actions the Complainants were mistreated. Therefore, the Ombudsman finds this complaint to be ***justified***.

CONCLUSION

The St. Cloud Police Department mistreated the Complainants by failing to thoroughly investigate the death of the Victim.

RECOMMENDATION

Minn. Stat. § 611A.74, Subd. 5(b) states that: "If the Ombudsman makes a recommendation to an appropriate authority for action, the authority shall, within a reasonable time period, but not more than thirty (30) days, inform the Ombudsman about the action taken or the reasons for not complying with the recommendation."

The St. Cloud Police Department has submitted policies and procedures, field training guides, and memoranda regarding homicide and suicide investigations, crime scene preservation and statement taking. The Ombudsman has reviewed this information and finds it to be satisfactory. The Ombudsman therefore recommends that all St. Cloud

Police Officers be reminded by memo of their obligation to treat all death scenes as a crime scene. The Ombudsman requires that this be accomplished by way of a memorandum to the officers as well as via announcement at roll call. Acknowledgment should be signed off by having the officers, note their duties, position and rank. The Ombudsman requires that the St. Cloud Police Department respond with a copy of the memorandum to the Ombudsman by June 14, 2002.

/s/	Laura Goodman-Brown Laura Goodman-Brown Ombudsman	May 10, 2002 Date
/s/	Loretta Huffman Loretta Huffman Investigator	May 10, 2002 Date

Laura Goodman-Brown, Ombudsman
1021 Bandana Boulevard East, Suite 225
St. Paul MN 55108

Your File: 2001-0117
Our File: 97008905

Dear Ms. Goodman-Brown:

Please note for future reference within your file that Chief O'Keefe retired on November 30, 2001. Chief Dennis L. Bellantine replaced him on December 3, 2001.

In accordance with your letter dated May 10, 2001 (sic), please consider this as a response to your office's Findings in the above captioned matter. The following items, although not all inclusive, are submitted for your consideration in accurately reflecting the findings:

1. The "Complainant's Statement of Facts" is incorrect in noting that, "The Victim had acted as an informant for the St. Cloud Police Department . . . " The Victim had acted as an informant for the Stearns County Sheriff [sic] Department during December of 1994 as indicated in their report included in the case file.

2. Reference was made to " . . . officers located a pistol on the couch and moved it to the kitchen counter." According to the police report, this was moved by EMS personnel to facilitate working to save the Victim.

3. The handgun used in this incident was not a pistol, it was a revolver. A pistol is a semi-automatic handgun.

4. Officers and EMS personnel did the best job they could to preserve the scene and yet maintain any remaining viability for the Victim. The officers' first and primary responsibility is providing medical assistance to the

victim. Unfortunately, as happened in this case, the scene became disturbed in an effort to keep the victim alive.

5. The scene was indeed examined as a crime scene. The evidence Technician on scene was a certified crime scene analyst with years of experience within this department but also during his military background with Army CID and previous employer in Texas.

6. Your footnotes 2 & 3 on Page 3 cannot be attributed to the St. Cloud Police Department Manual, as page 12 contains no such language.

7. The interview in the squad car is consistent with the recommended approach that "interviews of victims, witnesses and complainants will whenever possible be conducted in the field.", as noted on Page 12.

8. As noted in the police report, one investigator's tape recorder failed during the initial interview that day at the scene. In an effort to capture the witness's version in his own words again, he was contacted by phone to be interviewed.

9. The Department Manual section on Page 15 concerning the crime scene log being kept was not issued until March 5, 1998; obviously issued nearly a year after this incident.

10. The interviews of the victim's friends were not made at the Complainants' request. The St. Cloud Police Department had received, from the author, a copy of a letter she had sent the Scheeler family shortly after they filed their wrongful death lawsuit against the two shooting witnesses. There was not any communication from the Scheeler family to police regarding these names.

11. The reference to the newspaper interview done with Chief O'Keefe occurred on April 28, 1998, again after this incident.

12. The medical examiner is responsible under statute for making the final determination of cause and manner of death and it is their office that orders an autopsy.

STATE OF MINNESOTA
OFFICE OF CRIME VICTIMS OMBUDSMAN

[LOGO] 1021 Bandana Boulevard East, Suite 225 [SEAL]
St. Paul, MN 55108

[Phone Numbers Omitted In Printing]

July 17, 2002

Dennis Ballantine
Chief of Police
St. Cloud Police Department
807 Court House Square
P.O. Box 1616
St. Cloud, MN 56302

Dear Chief Ballantine:

Thank you for your response to critical report No. 2001-0117 issued by the Office of Crime Victims Ombudsman (OCVO) on May 10, 2002 and for your department's compliance with the OCVO's recommendations. In your response, several issues were raised, which I will address point by point:

1. The discrepancy noted in the Complainant's Statement of the Facts. Although you may be accurate, that portion of the report is entitled as it is because the information contained in that section is provided by the complainant and is not necessarily correct. It is provided to agencies so that they may acquire a better understanding of how crime victims perceive the criminal justice systems' treatment of them, as well as the beginning point of the OCVO's inquiries. As such, this portion will not be modified.

2. References regarding the movement of a pistol. Officer Mark Moline's statement describes, "... one of the ambulance crew members handed me the revolver and stated they wanted it out of the way.... I handled the revolver by placing my pen behind the trigger, in between the back of the trigger and the trigger guard, and carried the weapon over to the counter." Therefore, the reference made in the report is accurate.

3. Definitions of pistol. The term pistol refers to a firearm designated to be held and fired with one hand and could, therefore, mean a revolver or any other type of handgun. The particular term was used in OCVO's report as it was described likewise in St. Cloud Police Department's reports. (See Officer Moline's statement, "I saw a pistol lying on the couch just above the victim's head.") Therefore, the Findings report is consistent with terms used by the St. Cloud police department to describe the firearm in question.

4. Preserving the crime scene. Although, I do not disagree with your statement that, "[t]he officers' first and primary responsibility is providing medical assistance to the victim", it overlooks issues not related to the urgency of saving the victim. It seems by the reports that all officers involved accepted the statements of the witnesses to be true and failed to conduct necessary further inquiry into the incident. For example, the 911 call was received on 03/24/97 at 1456 hours. Sergeant Lebeaux's report dated 03/24/97, 1505 hours lists the disposition as "Exceptionally Cleared." As such, the report will not be modified.

5. The evidence technician. Although an evidence technician was sent to the scene, the scene was quickly surrendered, in part, based on the believed stories of the witnesses, whose interviews were done under less than perfect conditions. Quick assessments were made at the scene that rendered further necessary investigation almost impossible. As such, that portion of the report will not be modified.

6. Footnotes. You properly noted that footnotes 2 & 3 on page 3 could not be attributed to the St. Cloud Police Manual. Upon review, the OCVO found this to be a typo, which it has corrected. The statements in question were properly footnoted to *Iban, F. Reid, J.E., & Buckley, J. (1986). Criminal Interrogation and Confessions, Third Edition, Los Angeles: Williams and Wilkens. (See amended report – attached)*

7. The faulty tape recorder. The issue is not that the investigator conducted another interview, but rather that he did so in a leading manner. It is not considered standard practice to conduct leading interviews. This type of interview is difficult for the prosecution to use during trial and could be used by the defense to weaken a case against a defendant. As such, this portion of the report will not be modified.

8. The Department Manual. When asked for the policies regarding the handling of death scenes or near death scenes in effect during Craig Scheeler's death, former Police Chief Dennis O'Keefe sent me General Order No. 420, which although effective 05/03/97,

replaced a previous General Order 420 which was issued 09/25/95. If there were any substantive differences in the General Order that was effective at the time of Craig Scheeler's death, it would have been important to point that out. If you would like to forward me copies of the previous policy and that policy reads differently than the policy I was provided by your department in relationship to the Findings in this case, I will amend the Findings report to reflect that change.

9. Communication from the Scheeler family. Reports indicate that Captain Johnson originally received information from Craig Scheeler's mother indicating that she heard third or forth hand that Craig was the target of a gang hit. (*See statement of Officer Gerald Lehner dated 01/06/98, 1455 hours*) Scheeler's mother and father made follow-up requests to Captain Johnson via a letter. (*See statement of Officer Gerald Lehner, 08/27/98, 1500 hours*) As such, the notations in the report are accurate.

10. Newspaper reference. When a chief comments about his office's procedures, unless it is sited as a new policy, most readers would infer that he speaks to the historical policies, procedures and practices of the department. As such, pending direct evidence to the contrary, the report will not be modified.

11. The fact that the medical examiner is responsible under statute for making the final determination of cause and manner of death does not negate the police officers responsibility to communicate his/her desires/concerns

regarding the need for one. Therefore, this portion of the report will not be modified.

I am somewhat surprised by your response, which seems to lack any regret or convey any compassion towards this family. Although I realize that this action did not occur during your administration, it would be appropriate to acknowledge the tragic nature of this case for the sake of this family.

Again, I have enclosed an amended copy of the Findings Report for your records. This is the copy that will be provided to the Scheeler family along with your response and this reply. Because your department has complied with the recommendation in the Findings report, this case will be closed. If you have any further questions or discussion, please feel free to contact me directly.

Sincerely,

/s/ Laura Goodman-Brown
LAURA GOODMAN-BROWN
OMBUDSMAN

Enclosures

CC: Rhonda Scheeler

[LOGO] **POLICE DEPARTMENT** [LOGO]
807 Courthouse Square • P.O. Box 1616 • St. Cloud, MN 56302
OR 107304000 Phone 320-650-3830/FAX 320-650-3839

DENNIS BALLANTINE
CHIEF OF POLICE

June 11, 2002

Loretta Huffman, Investigator
State of Minnesota
Office of Crime victims Ombudsman
1021 Bandana Boulevard East
Suite 225
St. Paul, Minnesota 55108

RE: OCVO File No. 2001-0117
Rhonda and Delroy Scheeler

Dear Ms. Huffman:

Enclosed is a two-page memorandum that has been signed by St. Cloud police officers that death scenes are to be treated as a crime scene. This document is in response to the recommendation made by the Ombudsman in the matter of Rhonda Scheeler and Delroy Scheeler on behalf of Craig Scheeler.

Also, please find attached a note listing some of our concerns over the findings in your report.

If you have any questions, please feel free to contact me.

Sincerely,

D. Ballantine
Chief of Police

DB:lj
Enclosures

Pursuant to a report from the State Ombudsman, each officer must sign below indicating they understand the basic police requirement that all officers responding to the scene of a reported or discovered death must proceed on the assumption that the death may be a homicide, unless the death occurs while the person was under the care of a physician, in a hospital, or other health care facility.

Athman, Tony /s/ Tony Athman
Officer Patrol Division

Atkinson, Lawrence /s/ Lawrence Atkinson
Sergeant Criminal Investigations

Ballantine, Dennis /s/ Dennis Ballantine
Chief Administration

Baloun, Brent /s/ Brent Baloun
Sergeant Criminal Investigations

Beise, Perry /s/ Perry J. Beise
Sergeant Technical Services

Bentrud, David /s/ David Bentrud
Sergeant Patrol Division

Bluhm, Kathleen /s/ Kathleen Bluhm
Officer Criminal Investigations

Boulton, Tracey /s/ Tracey Boulton
Officer Patrol Division

Brovold, Nathaniel /s/ Nathaniel Brovold
Officer Criminal Investigations

Bunde, Louis /s/ Louis Bunde
Officer Patrol Division

Burke, Jason /s/ Jason Burke
Officer Patrol Division

Dammen, Jeffrey /s/ Jeffrey Dammen
Officer Patrol Division

Dix, Aaron /s/ Aaron Dix
Officer Patrol Division

Douvier, Jesse /s/ Jesse Douvier
Officer Patrol Division

Edblad, Gerald /s/ Gerald Edblad
Sergeant Patrol Division

Feeney, James /s/ James M. Feeney
Sergeant Patrol Division

Fonss, Joan /s/ Joan Fonss
Officer Patrol Division

Gjemse, Thomas /s/ Thomas Gjemse
Sergeant Patrol Division

Gohman, Michael /s/ Michael Gohman
Sergeant Professional Services

Gohman, Stacy /s/ Stacy Gohman
Officer Patrol Division

Grams, Paul /s/ Paul B. Grams
Officer Patrol Division

Greenwald, Daniel /s/ Dan Greenwald
Officer Criminal Investigations

Grossback, Patrick On extended FMLA [/s/ sls]
Officer Patrol Division

Hanson, Jason /s/ J. Hanson
Officer Criminal Investigations

Hoeschen, Tad /s/ Tad Hoeschen
Officer Patrol Division

Hoppe, John /s/ John Hoppe
Officer Patrol Division

Irvin, Lori /s/ Lori Irvin
Sergeant Patrol Division

Janssen, Jeffrey /s/ Jeffrey Janssen
Sergeant Patrol Division

Jensen, Eric /s/ Eric Jensen
Officer Patrol Division

Johnson, David /s/ David Johnson
Captain Criminal Investigations

Johnson, Robert /s/ Robert Johnson
Officer Patrol Division

Justin, Thomas /s/ Thomas Justin
Lieutenant Patrol Division

Keller, Peter /s/ Peter Keller
Officer Patrol Division

Koeniguer, Michael /s/ Michael Koeniguer
Officer Patrol Division

Kraayenbrink, Joseph /s/ Joseph Kraayenbrink
Officer Patrol Division

Kutzman, Kevin /s/ Kevin Kutzman
Officer Patrol Division

LaBeaux, David /s/ David LaBeaux
Sergeant Criminal Investigations

Lehner, Gerald /s/ Gerald Lehner
Officer Criminal Investigations

Lester, Jeffrey /s/ Jeffrey Lester
Officer Patrol Division

Lewandowski, Michael /s/ Michael Lewandowski
Officer Patrol Division

Lewellyn, Timothy On extended Administrative leave [/s/ sls]
Officer Patrol Division

Mastey, Thomas /s/ Thomas Mastey
Officer Patrol Division

Mayavski, Lee /s/ Lee Mayavski
Officer Patrol Division

Metcalf, James /s/ James Metcalf
Sergeant Patrol Division

Missell, David /s/ David Missell
Officer Patrol Division

Moline, Mark /s/ Mark Moline
Sergeant Patrol Division

Mortiz, Dean /s/ Dean Moritz
Officer Patrol Division

Mortenson, James /s/ James Mortenson
Sergeant Patrol Division

O'Neil, Thomas /s/ Thomas O'Neil
Officer Patrol Division

Orth, Daniel /s/ Daniel Orth
Officer Patrol Division

Orth, Lloyd /s/ Lloyd Orth
Officer Criminal Investigations

Oxton, Jeffrey /s/ Jeffrey Oxton
Officer Criminal Investigations

Paschke, Steven /s/ Steven Paschke
Sergeant Patrol Division

Proshek, Susan /s/ Susan Proshek
Officer Criminal Investigations

Rathbun, Jared /s/ Jared Rathbun
Officer Patrol Division

Raygor, Kean /s/ Kean Raygor
Officer Patrol Division

Riba, Nicholas /s/ Nicholas Riba
Officer Patrol Division

Rowe, Neal /s/ Neal Rowe
Sergeant Criminal Investigations

Rowley, Michael /s/ Michael Rowley
Officer Criminal Investigations

Salzer, Jay /s/ Jay Salzer
Officer Patrol Division

Sayre, Martin /s/ Martin Sayre
Officer Patrol Division

Schlieman, Jessica On extended FMLA (South America) [/s/ sls]
Officer Patrol Division

Schlieman, Thomas /s/ Thomas Schlieman
Officer Patrol Division

Schreiber, Robert /s/ Robert Schreiber
Officer Criminal Investigations

Schrom, Robb /s/ Robb Schrom
Officer Patrol Division

Shattuck, Dawn /s/ Dawn Shattuck
Officer Patrol Division

Shoutz, Tiffany /s/ Tiffany Shoutz
Officer Patrol Division

Simondet, Kelly /s/ Kelly Simondet
Sergeant Patrol Division

Smith, Nicholas /s/ Nicholas Smith
Officer Patrol Division

Stawarski, Susan /s/ Susan Stawarski
Captain Patrol Division

Stellmach, Aaron On extended FMLA (South America) [/s/ sls]
Officer Patrol Division

Steve, James /s/ James Steve
Officer Criminal Investigations

Stone, David /s/ David Stone
Officer Criminal Investigations

Tesch, David /s/ David Tesch
Officer Patrol Division

Thelen, Jolene /s/ Jolene Thelen
Officer Patrol Division

Vargason, Tara /s/ Tara Vargason
Officer Patrol Division

Vette, John /s/ John Vette
Officer Patrol Division

Villanueva, Tomas /s/ Tomas Villanueva
Officer Patrol Division

Warhol, Eric /s/ Eric Warhol
Officer Patrol Division

Warner, Steven /s/ Steven Warner
Officer Patrol Division

Weleski, Dustin /s/ Dustin Weleski
Officer Criminal Investigations

Whitson, Anne /s/ Anne Whitson
Officer Criminal Investigations

Wilson, Richard /s/ Richard Wilson
Captain Technical Services

Zabrocki, Christina /s/ Christina Zabrocki
Officer Patrol Division

Date: May 30, 2002

No. 05-466

In The
Supreme Court of the United States

DELROY C. SCHEELER, individually and on behalf of Craig A. Scheeler, and RHONDA L. SCHEELER, individually and as Trustee on behalf of Craig A. Scheeler,

Petitioners,

vs.

CITY OF ST. CLOUD, MINNESOTA, COUNTY OF STEARNS, MINNESOTA, DENNIS O'KEEFE, individually and in his former official capacity as Chief of Police for the City of St. Cloud, Minnesota, LARRY MEYER, individually, and in his former official capacity as Mayor of the City of St. Cloud, Minnesota, DR. DAVID FREDRICKSON, individually and in his official capacity as Medical Examiner for the County of Stearns, Minnesota, LEE MAYAVSKI, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota and a Deputy Medical Examiner for the County of Stearns, Minnesota, DAVID JOHNSON, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota, GARY LEININGER, individually and in his official capacity as a Police Officer/Evidence Technician for the City of St. Cloud, Minnesota, DAVID LABEAUX, individually and in his official capacity as a Police Officer for the City of St. Cloud, Minnesota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR REHEARING

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INTRODUCTION

Petitioners respectfully request the Court to reconsider its Order denying the petition for a Writ of Certiorari in *Scheeler v. City of St. Cloud*, 402 F.3d 826 (2005). The Eighth Circuit Court of Appeals clearly disregarded the holding of *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978) by dismissing Scheelers' claim.

Scheelers assert a claim of 28 U.S.C. § 1983 injury caused by "municipal official policy". This claim and the required factual basis therefore are set out and recognized by *Monell*. The Eighth Circuit Court of Appeals dismissed Scheelers' claim against the municipal defendants without any mention of the claim or basis for the dismissal. By silently dismissing the Scheelers' claim, without addressing it, the Court circumvented petitioners' First Amendment right to petition the courts. The right to petition the courts is guaranteed, one of the highest and most essential privileges of citizenship, under the First Amendment, the Fourteenth Amendment and 28 U.S.C. § 1983. Substantial grounds exist to grant Petitioners' request to reconsider the denial of the Writ of Certiorari.

I. The right to petition the government, as guaranteed under the First Amendment, is rendered meaningless when a § 1983 claim of municipal liability that is recognized under *Monell*, clearly plead and supported by affidavit is dismissed without any acknowledgment or reason.

The U.S. Supreme Court stated that the right to petition is "among the most precious of the liberties

safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967).

The Eighth Circuit stated that "access to the courts is a fundamental right of every citizen." *Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422 (1986) quoting *Inmates of the Nebraska Penal and Correctional Complex v. Greenholtz,* 436 F. Supp. 432, 436 (D. Neb. 1976), *aff'd*, 567 F.2d 1381 (8th Cir. 1977), *cert. denied*, 439 U.S. 841, 58 L. Ed. 2d 140, 99 S. Ct. 132 (1978).

The "precious liberty" and "fundamental right" afforded by these decisions quietly evaporate when a subsequent decision dismisses the very petition that is guaranteed under the First Amendment. Petitioners are guaranteed, at the very least, a written and reasoned basis for dismissing their claim. To what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom can be hermetically sealed against him by dismissing a valid claim without reason. *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). The silent and unsupported dismissal by the trial court has also prejudiced the Petitioners' rights and ability to bring a meaningful appeal of the decision.

One of the highest and most essential privileges of citizenship is the right to access the courts. To bring suit and defend when injustice has been done. The U.S. Supreme Court sets the precedent for other courts to follow. Cases like *Monell* tells average citizens what their rights are in a particular situation, whether they have a valid claim and how the courts will handle their claim. Established precedent gives hope and guidance to citizens. When wronged, a citizen can present their recognized claim in court and be heard fairly. Pursuant to *Monell*, if a municipality has an

official policy, a policy written down by the policymakers or otherwise ratified by the policymakers of the municipality, and that policy, when implemented, directly causes their constitutional rights to be taken away, then a valid claim is stated. Petitioners have met all of the above criteria under *Monell* to state a claim of municipal liability. The Court's decision did not invalidate the claim or find that the allegation of an impermissible official policy was defective in some manner. Rather, the dismissal is accomplished for no reason at all. The analysis that was provided by the Trial Court was that municipalities are not "persons" under section 1983. The analysis provided by the Court of Appeals was targeted at a claim that was not brought by Petitioners; i.e., liability based upon custom of the municipality. Petitioners are now at the end of the justice system after doing all they were supposed to do. They are dismissed with a silent wave goodbye from the trial court and an incomplete affirmation by the Court of Appeals.

As early as 1885, the United States Supreme Court declared that all persons:

> "should have like access to the courts of the country for the protection of their persons and property, and the prevention and redress of wrongs . . . No impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances . . . No greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . " *Barbier v. Connolly*, 113 U.S. 27, 5 S. Ct. 357, 28 L. Ed. 923 (1885)"

In *Monell*, the Supreme Court laid down the requirements of a municipal claim. In *Scheeler v. City of St.*

Cloud, 402 F.3d 826 (2005), the Eighth Circuit quoted *Monell*:

> "[i]n a section 1983 action, a municipality may only be held liable for constitutional violations which result from a policy or custom of the municipality." *Turney v. Waterbury*, 375 F.3d 756, 761-62 (8th Cir. 2004) (*quoting Yellow Horse v. Pennington County*, 255 F.3d 923, 928 (8th Cir. 2002)).

This is correct. Petitioners alleged an official policy. The Court reasoned that Petitioners did not show "custom" and therefore the claim was dismissed. What happened to "policy"? Policy and custom is not the same thing according to *Monell*. A claim that is based on official policy does not need to show custom. Therefore, a dismissal based on custom has no relevance to the official policy claim.

The trial court stated the following in *Scheeler v. City of St. Cloud*:

> "We agree, however with the defendants that the County of Stearns, and the City of St. Cloud, as political subdivisions of the State of Minnesota, are not "persons" within the meaning of Section 1983. See, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999); *Murphy v. State of Ark.*, 127 F.3d 750, 754 (8th Cir. 1997; *State of Mo. Ex rel. Missouri Highway and Transp. Com'n v. Cuffley*, 112 F.3d 1332, 1335 n.8 (8th Cir. 1997). Therefore, we find that the Defendants County of Stearns, and the City of St. Cloud, are not proper defendants in this action, and the claims against them are dismissed with prejudice."

The Eighth Circuit Court of Appeals stated the following in *Scheeler v. City of St. Cloud*:

> "Lastly, the district court held that even if the individual suits survived, the Scheelers could not make out a case against the municipal defendants because they were not "persons" within the meaning of § 1983. The Scheelers assert that the city and county should be considered "persons" and thus subject to § 1983 liability. They are correct. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 690-91 (1978) (characterizing local government as "persons" subject to liability under § 1983). It remains true, however, that "[i]n a section 1983 action, a municipality may only be held liable for constitutional violations which result from a policy or custom of the municipality." *Turney v. Waterbury*, 375 F.3d 756, 761-62 (8th Cir. 2004) (*quoting Yellow Horse v. Pennington County*, 255 F.3d 923, 928 (8th Cir. 2002)). The record is devoid of any evidence that the investigatory failures that the Scheelers alleged were the result of a lack of training, or a custom or practice of St. Cloud or Stearns County. Indeed, the Ombudsman's report states that the St. Cloud Police Department "violated its own policy" by neglecting to view Craig's house as a potential crime scene. (Appellant's App. at 332.) We find no error in the district court's dismissal of the municipal defendants."

Neither opinion addresses the Petitioners' claims based upon official policies of the municipal defendants.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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Dated January 31, 2006

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 44.2.

Counsel for Petitioner